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ABSTRACT

This seminar workbook was compiled to aid practitioners in understanding the latest in civil rights law and tactics in representing school districts in civil rights cases. In a loose-leaf format, it contains articles and outlines by the faculty as well as decisions, sample pleadings, and legal texts. The workbook includes the following materials: (1) the full text of the Civil Rights Act of 1991 followed by "Summary of the CRA of 1991" (Gwendolyn H. Gregory) and "Civil Rights Act of 1991--An Overview" (Ronald J. James); (2) "Motions in Federal Litigation" (Eric W. Schulze); (3) "Burden of Proof in Employee Discrimination Cases" (Henry W. Saad and Robert E. Carr); (4) "Preparation and Use of Expert Witnesses in Defending Civil Rights Suits against Your School District Clients" (Ronald J. James and Helen Kryshtalowych); (5) "Vicarious Liability/Respondeat Superior under Section 1983" (Martin Semple); "Vicarious Liability/under "Color or Law'" (Eric W. Schulze); and "The Scope of Federal Civil Rights Liability of School Districts and Their Employees under 42 U.S.C. 1983" (Joe B. Hairston); (6) "Defending Child Abuse Cases" (David B. Rubin); "Child Abuse and Neglect: Implications for Educators" (Richard G. Salmon and M. David Alexander); (7) "Insurance Issues and Ethical Constraints" (David B. Rubin); "Defending Against Whistleblower Claims" (Henry Saad and Terry Milne); (8) "Dealing with the Press on Litigation" (Martin Semple); (9) "Due Process Hearings under the I.D.E.A." (David Rubin); "Special Education Litigation: The Preparation and Trial" (John P. Heil); and (10) "Settlement Agreements in Civil Rights Lawsuits: Some Considerations" (Martin Semple). The last section contains samples of seven different forms to be used in pleadings. (MLF)

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SO NOW YOU'VE BEEN SUED: STRATEGIES THAT WIN

Defending Civil Rights Suits Against Your School District Client

SEMINAR COURSEBOOK

This workbook was compiled to aid practitioners in understanding the latest in civil rights law and tactics in representing school districts in civil rights cases. It contains thoughtful and informative pieces by national experts on issues confronting school board attorneys and educators today.

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FOREWORD

The National School Boards Association is pleased to welcome you to the Council of School Attorneys' advocacy seminar "So Now You've Been Sued: Strategies That Win."

During the seminar you will be briefed on trial tactics and tactics in due process hearings in cases involving a variety of civil rights laws. This seminar offers intensive courses taught by a veteran faculty that will provide you with the information and expertise you need to represent your school district effectively. The next two days are filled with practical information to help you win lawsuits - including tips on settlement, preparation for trial, and trial tactics.

We are sure that you will find this notebook invaluable. It contains articles and outlines by the faculty and others as well as decisions, sample pleadings, and other documents particularly relevant to the curriculum. It is a one-of-a-kind document that will save you countless hours of painstaking research.

We are proud of this seminar and are interested in your reactions. We welcome your comments at any time and wish you an enjoyable and informative meeting.

James C. Hanks

James C. Hanks
Chairman,
NSBA Council of School Attorneys

August W. Steinhilber

August W. Steinhilber
General Counsel
National School Boards Association

THIS PUBLICATION IS DESIGNED TO PROVIDE ACCURATE AND AUTHORITATIVE INFORMATION IN REGARD TO THE SUBJECT MATTER COVERED. IT IS SOLD WITH THE UNDERSTANDING THAT THE PUBLISHER IS NOT ENGAGED IN RENDERING LEGAL, ACCOUNTING OR OTHER PROFESSIONAL SERVICE. IF LEGAL ADVICE OR OTHER EXPERT ASSISTANCE IS REQUIRED, THE SERVICES OF A COMPETENT PROFESSIONAL PERSON SHOULD BE SOUGHT.

NSBA Council of School Attorneys' Seminar

So Now You've Been Sued: Strategies That Win

Keystone, Colorado
February 6-7, 1992

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CIVIL RIGHTS ACT OF 1991

Text of Measure — S. 1745

As Approved by the House and Senate

November 7, 1991

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Civil Rights Act of 1991".

SEC. 2. FINDINGS.

The Congress finds that—

(1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace;

(2) the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections; and

(3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

SEC. 3. PURPOSES.

The purposes of this Act are—

(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;

(2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989);

(3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); and

(4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

TITLE I—FEDERAL CIVIL RIGHTS REMEDIES

SEC. 101. PROHIBITION AGAINST ALL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS.

Section 1977 of the Revised Statutes (42 U.S.C. 1981) is amended—

(1) by inserting "(a)" before "All persons within"; and

(2) by adding at the end the following new subsections:

"(b) For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

"(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

SEC. 102. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION.

The Revised Statutes are amended by inserting after section 1977 (42 U.S.C. 1981) the following new section:

"SEC. 1977A. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION IN EMPLOYMENT.

'(a) Right of Recovery.—

'(1) Civil rights.—In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3), and provided that the complaining party cannot recover under section 1977 of the Revised Statutes (42 U.S.C. 1981), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

'(2) Disability.—In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 505(a)(1) of the Rehabilitation Act of 1973 (29 U.S.C. 794a(a)(1)), respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791) and the regulations implementing section 501, or who violated the requirements of section 501 of the Act or the regulations implementing section 501 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

'(3) Reasonable accommodation and good faith effort.—In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 or regulations implementing section 501 of the Rehabilitation Act of 1973, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

"(b) Compensatory and Punitive Damages.—

"(1) Determination of punitive damages.—A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

"(2) Exclusions from compensatory damages.—Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964.

"(3) Limitations.—The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

"(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

"(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

"(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

"(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

"(4) Construction.—Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1977 of the Revised Statutes (42 U.S.C. 1981).

"(c) Jury Trial.—If a complaining party seeks compensatory or punitive damages under this section—

"(1) any party may demand a trial by jury; and

"(2) the court shall not inform the jury of the limitations described in subsection (b)(3).

"(d) Definitions.—As used in this section:

"(1) Complaining party.—The term 'complaining party' means—

"(A) in the case of a person seeking to bring an action under subsection (a)(1), the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

"(B) in the case of a person seeking to bring an action under subsection (a)(2), the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 505(a)(1) of the Rehabilitation Act of 1973 (29 U.S.C. 794a(a)(1), or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.).

"(2) Discriminatory practice.—The term 'discriminatory practice' means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a).

SEC. 103. ATTORNEY'S FEES.

The last sentence of section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting ", 1977A" after "1977".

SEC. 104. DEFINITIONS.

Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e) is amended by adding at the end the following new subsections:

"(l) The term 'complaining party' means the Commission, the Attorney General, or a person who may bring an action or proceeding under this title.

"(m) The term 'demonstrates' means meets the burdens of production and persuasion.

"(n) The term 'respondent' means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 717."

SEC. 105. BURDEN OF PROOF IN DISPARATE IMPACT CASES.

(a) Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) is amended by adding at the end the following new subsection:

"(k)(1)(A) An unlawful employment practice based on disparate impact is established under this title only if—

"(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

"(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

"(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

"(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

"(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative employment practice'.

"(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this title.

"(3) Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.".

(b) No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove—Business necessity/cumulation/alternative business practice.

SEC. 106. PROHIBITION AGAINST DISCRIMINATORY USE OF TEST SCORES.

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by section 105) is further amended by adding at the end the following new subsection:

"(l) It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.".

SEC. 107. CLARIFYING PROHIBITION AGAINST IMPERMISSIBLE CONSIDERATION OF RACE, COLOR, RELIGION, SEX, OR NATION-

AL ORIGIN IN EMPLOYMENT PRACTICES.

(a) In General.—Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by sections 105 and 106) is further amended by adding at the end the following new subsection:

"(m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.".

(b) Enforcement Provisions.—Section 706(g) of such Act (42 U.S.C. 2000e-5(g)) is amended—

(1) by designating the first through third sentences as paragraph (1);

(2) by designating the fourth sentence as paragraph (2)(A) and indenting accordingly; and

(3) by adding at the end the following new subparagraph:

"(B) On a claim in which an individual proves a violation under section 703(m) and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

"(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m); and

"(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).".

SEC. 108. FACILITATING PROMPT AND ORDERLY RESOLUTION OF CHALLENGES TO EMPLOYMENT PRACTICES IMPLEMENTING LITIGATED OR CONSENT JUDGMENTS OR ORDERS.

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by sections 105, 106, and 107 of this title) is further amended by adding at the end the following new subsection:

"(n)(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

"(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws—

"(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had—

"(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

"(II) a reasonable opportunity to present objections to such judgment or order; or

"(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

"(2) Nothing in this subsection shall be construed to—

"(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

"(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

"(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

"(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

"(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28, United States Code.".

SEC. 109. PROTECTION OF EXTRATERRITORIAL EMPLOYMENT.

(a) Definition of Employee.—Section 701(f) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(f)) and section 101(4) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111(4)) are each amended by adding at the end the following: "With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.".

(b) Exemption.—

(1) Civil rights act of 1964.—Section 702 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1) is amended—

(A) by inserting "(a)" after "Sec. 702."; and

(B) by adding at the end the following:

"(b) It shall not be unlawful under section 703 or 704 for an employer (or a corporation controlled by an employer), labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining (including on-the-job training programs) to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation), such organization, such agency, or such committee to violate the law of the foreign country in which such workplace is located.

"(c)(1) If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by section 703 or 704 engaged in by such corporation shall be presumed to be engaged in by such employer.

"(2) Sections 703 and 704 shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

"(3) For purposes of this subsection, the determination of whether an employer controls a corporation shall be based on—

"(A) the interrelation of operations;

"(B) the common management;

"(C) the centralized control of labor relations; and

"(D) the common ownership or financial control, of the employer and the corporation.".

(2) Americans with disabilities act of 1990.—Section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112) is amended—

(A) by redesignating subsection (c) as subsection (d); and

(B) by inserting after subsection (b) the following new subsection:

"(c) Covered Entities in Foreign Countries.—

"(1) In general.—It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

"(2) Control of corporation.—

"(A) Presumption.—If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

"(B) Exception.—This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

"(C) Determination.—For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on—

"(i) the interrelation of operations;

"(ii) the common management;

"(iii) the centralized control of labor relations; and

"(iv) the common ownership or financial control, of the employer and the corporation.".

(c) Application of Amendments.—The amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act.

SEC. 110. TECHNICAL ASSISTANCE TRAINING INSTITUTE.

(a) Technical Assistance.—Section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4) is amended by adding at the end the following new subsection:

"(j)(1) The Commission shall establish a Technical Assistance Training Institute, through which the Commission shall provide technical assistance and training regarding the laws and regulations enforced by the Commission.

"(2) An employer or other entity covered under this title shall not be excused from compliance with the requirements of this title because of any failure to receive technical assistance under this subsection.

"(3) There are authorized to be appropriated to carry out this subsection such sums as may be necessary for fiscal year 1992.".

(b) Effective Date.—The amendment made by this section shall take effect on the date of the enactment of this Act.

SEC. 111. EDUCATION AND OUTREACH.

Section 705(h) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4(h)) is amended—

(1) by inserting "(1)" after "(h)'; and

(2) by adding at the end the following new paragraph:

"(2) In exercising its powers under this title, the Commission shall carry out educational and outreach activities (including dissemination of information in languages other than English) targeted to—

"(A) individuals who historically have been victims of employment discrimination and have not been equitably served by the Commission; and

"(B) individuals on whose behalf the Commission has authority to enforce any other law prohibiting employment discrimination, concerning rights and obligations under this title or such law, as the case may be.".

SEC. 112. EXPANSION OF RIGHT TO CHALLENGE DISCRIMINATORY SENIORITY SYSTEMS.

Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(e)) is amended—

(1) by inserting "(1)" before "A charge under this section'; and

(2) by adding at the end the following new paragraph:

"(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.".

SEC. 113. AUTHORIZING AWARD OF EXPERT FEES.

(a) Revised Statutes.—Section 722 of the Revised Statutes is amended—

(1) by designating the first and second sentences as subsections (a) and (b), respectively, and indenting accordingly; and

(2) by adding at the end the following new subsection:

"(c) In awarding an attorney's fee under subsection (b) in any action or proceeding to enforce a provision of sections 1977 or 1977A of the Revised Statutes, the court, in its discretion, may include expert fees as part of the attorney's fee.".

(b) Civil Rights Act of 1964.—Section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)) is amended by inserting "(including expert fees)" after "attorney's fee".

SEC. 114. PROVIDING FOR INTEREST AND EXTENDING THE STATUTE OF LIMITATIONS IN ACTIONS AGAINST THE FEDERAL GOVERNMENT.

Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16) is amended—

(1) in subsection (c), by striking "thirty days" and inserting '90 days'; and

(2) in subsection (d), by inserting before the period ", and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.".

SEC. 115. NOTICE OF LIMITATIONS PERIOD UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967.

Section 7(e) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626(e)) is amended—

(1) by striking paragraph (2);

(2) by striking the paragraph designation in paragraph (1);

(3) by striking "Sections 6 and" and inserting "Section'; and

(4) by adding at the end the following:

"If a charge filed with the Commission under this Act is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 11(a) against the respondent named in the charge within 90 days after the date of the receipt of such notice.".

SEC. 116. LAWFUL COURT-ORDERED REMEDIES, AFFIRMATIVE ACTION, AND CONCILIATION AGREEMENTS NOT AFFECTED.

Nothing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law.

SEC. 117. COVERAGE OF HOUSE OF REPRESENTATIVES AND THE AGENCIES OF THE LEGISLATIVE BRANCH.

(a) Coverage of the House of Representatives.—

(1) In general.—Notwithstanding any provision of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) or of other law, the purposes of such title shall, subject to paragraph (2), apply in their entirety to the House of Representatives.

(2) Employment in the house.—

(A) Application.—The rights and protections under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) shall, subject to subparagraph (B), apply with respect to any employee in an employment position in the House of Representatives and any employing authority of the House of Representatives.

(B) Administration.—

(i) In general.—In the administration of this paragraph, the remedies and procedures made applicable pursuant to the resolution described in clause (ii) shall apply exclusively.

(ii) Resolution.—The resolution referred to in clause (i) is the Fair Employment Practices Resolution (House Resolution 558 of the One Hundredth Congress, as agreed to October 4, 1988), as incorporated into the Rules of the House of Representatives of the One Hundred Second Congress as Rule LI, or any other provision that continues in effect the provisions of such resolution.

(C) Exercise of rulemaking power.—The provisions of subparagraph (B) are enacted by the House of Representatives as an exercise of the rulemaking power of the House of Representatives, with full recognition of the right of the House to change its rules, in the same manner, and to the same extent as in the case of any other rule of the House.

(b) Instrumentalities of Congress.—

(1) In general.—The rights and protections under this title and title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) shall, subject to paragraph (2), apply with respect to the conduct of each instrumentality of the Congress.

(2) Establishment of remedies and procedures by instrumentalities.—The chief official of each instrumentality of the Congress shall establish remedies and procedures to be utilized with respect to the rights and protections provided pursuant to paragraph (1). Such remedies and procedures shall apply exclusively, except for the employees who are defined as Senate employees, in section 301(c)(1).

(3) Report to Congress.—The chief official of each instrumentality of the Congress shall, after establishing remedies and procedures for purposes of paragraph (2), submit to the Congress a report describing the remedies and procedures.

(4) Definition of instrumentalities.—For purposes of this section, instrumentalities of the Congress include the following: the Architect of the Capitol, the Congressional Budget Office, the General Accounting Office, the Government Printing Office, the Office of Technology Assessment, and the United States Botanic Garden.

(5) Construction.—Nothing in this section shall alter the enforcement procedures for individuals protected under section 717 of title VII for the Civil Rights Act of 1964 (42 U.S.C. 2000e-16).

SEC. 118. ALTERNATIVE MEANS OF DISPUTE RESOLUTION.

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

TITLE II—GLASS CEILING

SEC. 201. SHORT TITLE.

This title may be cited as the "Glass Ceiling Act of 1991".

SEC. 202. FINDINGS AND PURPOSE.

(a) Findings.—Congress finds that—

(1) despite a dramatically growing presence in the workplace, women and minorities remain underrepresented in management and decisionmaking positions in business;

(2) artificial barriers exist to the advancement of women and minorities in the workplace;

(3) United States corporations are increasingly relying on women and minorities to meet employment requirements and are increasingly aware of the advantages derived from a diverse work force;

(4) the "Glass Ceiling Initiative" undertaken by the Department of Labor, including the release of the report entitled "Report on the Glass Ceiling Initiative", has been instrumental in raising public awareness of—

(A) the underrepresentation of women and minorities at the management and decisionmaking levels in the United States work force;

(B) the underrepresentation of women and minorities in line functions in the United States work force;

(C) the lack of access for qualified women and minorities to credential-building developmental opportunities; and

(D) the desirability of eliminating artificial barriers to the advancement of women and minorities to such levels;

(5) the establishment of a commission to examine issues raised by the Glass Ceiling Initiative would help—

(A) focus greater attention on the importance of eliminating artificial barriers to the advancement of women and minorities to management and decisionmaking positions in business; and

(B) promote work force diversity;

(6) a comprehensive study that includes analysis of the manner in which management and decisionmaking positions are filled, the developmental and skill-enhancing practices used to foster the necessary qualifications for advancement, and the compensation programs and reward structures utilized in the corporate sector would assist in the establishment of practices and policies promoting opportunities for, and eliminating artificial barriers to, the advancement of women and minorities to management and decisionmaking positions; and

(7) a national award recognizing employers whose practices and policies promote opportunities for, and eliminate artificial barriers to, the advancement of women and minorities will foster the advancement of women and minorities into higher level positions by—

(A) helping to encourage United States companies to modify practices and policies to promote opportunities for, and eliminate artificial barriers to, the upward mobility of women and minorities; and

(B) providing specific guidance for other United States employers that wish to learn how to revise practices and policies to improve the access and employment opportunities of women and minorities; and

(b) Purpose.—The purpose of this title is to establish—

(1) a Glass Ceiling Commission to study—

(A) the manner in which business fills management and decisionmaking positions;

(B) the developmental and skill-enhancing practices used to foster the necessary qualifications for advancement into such positions; and

(C) the compensation programs and reward structures currently utilized in the workplace; and

(2) an annual award for excellence in promoting a more diverse skilled work force at the management and decisionmaking levels in business.

SEC. 203. ESTABLISHMENT OF GLASS CEILING COMMISSION.

(a) In General.—There is established a Glass Ceiling Commission (referred to in this title as the "Commission"), to conduct a study and prepare recommendations concerning—

(1) eliminating artificial barriers to the advancement of women and minorities; and

(2) increasing the opportunities and developmental experiences of women and minorities to foster advancement of women and minorities to management and decisionmaking positions in business.

(b) Membership.—

(1) Composition.—The Commission shall be composed of 21 members, including—

(A) six individuals appointed by the President;

(B) six individuals appointed jointly by the Speaker of the House of Representatives and the Majority Leader of the Senate;

(C) one individual appointed by the Majority Leader of the House of Representatives;

(D) one individual appointed by the Minority Leader of the House of Representatives;

(E) one individual appointed by the Majority Leader of the Senate;

(F) one individual appointed by the Minority Leader of the Senate;

(G) two Members of the House of Representatives appointed jointly by the Majority Leader and the Minority Leader of the House of Representatives;

(H) two Members of the Senate appointed jointly by the Majority Leader and the Minority Leader of the Senate; and

(I) the Secretary of Labor.

(2) Considerations.—In making appointments under subparagraphs (A) and (B) of paragraph (1), the appointing authority shall consider the background of the individuals, including whether the individuals—

(A) are members of organizations representing women and minorities, and other related interest groups;

(B) hold management or decisionmaking positions in corporations or other business entities recognized as leaders on issues relating to equal employment opportunity; and

(C) possess academic expertise or other recognized ability regarding employment issues.

(3) Balance.—In making the appointments under subparagraphs (A) and (B) of paragraph (1), each appointing authority shall seek to include an appropriate balance of appointees from among the groups of appointees described in subparagraphs (A), (B), and (C) of paragraph (2).

(c) Chairperson.—The Secretary of Labor shall serve as the Chairperson of the Commission.

(d) Term of Office.—Members shall be appointed for the life of the Commission.

(e) Vacancies.—Any vacancy occurring in the membership of the Commission shall be filled in the same manner as the original appointment for the position being vacated. The vacancy shall not affect the power of the remaining members to execute the duties of the Commission.

(f) Meetings.—

(1) Meetings prior to completion of report.—The Commission shall meet not fewer than five times in connection with and pending the completion of the report described in section 204(b). The Commission shall hold additional meetings if the Chairperson or a majority of the members of the Commission request the additional meetings in writing.

(2) Meetings after completion of report.—The Commission shall meet once each year after the completion of the report described in section 204(b). The Commission shall hold additional meetings if the Chairperson or a majority of the members of the Commission request the additional meetings in writing.

(g) Quorum.—A majority of the Commission shall constitute a quorum for the transaction of business.

(h) Compensation and Expenses.—

(1) Compensation.—Each member of the Commission who is not an employee of the Federal Government shall receive compensation at the daily equivalent of the rate specified for level V of the Executive Schedule under section 5316 of title 5, United States Code, for each day the member is engaged in the performance of duties for the Commission, including attendance at meetings and conferences of the Commission, and travel to conduct the duties of the Commission.

(2) Travel expenses.—Each member of the Commission shall receive travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, for each day the member is engaged in the performance of duties away from the home or regular place of business of the member.

(3) Employment status.—A member of the Commission, who is not otherwise an employee of the Federal Government, shall not be deemed to be an employee of the Federal Government except for the purposes of—

(A) the tort claims provisions of chapter 171 of title 28, United States Code; and

(B) subchapter I of chapter 81 of title 5, United States Code, relating to compensation for work injuries.

SEC. 204. RESEARCH ON ADVANCEMENT OF WOMEN AND MINORITIES TO MANAGEMENT AND DECISIONMAKING POSITIONS IN BUSINESS.

(a) Advancement Study.—The Commission shall conduct a study of opportunities for, and artificial barriers to, the advancement of women and minorities to management and decisionmaking positions in business. In conducting the study, the Commission shall—

(1) examine the preparedness of women and minorities to advance to management and decisionmaking positions in business;

(2) examine the opportunities for women and minorities to advance to management and decisionmaking positions in business;

(3) conduct basic research into the practices, policies, and manner in which management and decisionmaking positions in business are filled;

(4) conduct comparative research of businesses and industries in which women and minorities are promoted to management and decisionmaking positions, and businesses and industries in which women and minorities are not promoted to management and decisionmaking positions;

(5) compile a synthesis of available research on programs and practices that have successfully led to the advancement of women and minorities to management and decisionmaking positions in business, including training programs, rotational assignments, developmental programs, reward programs, employee benefit structures, and family leave policies; and

(6) examine any other issues and information relating to the advancement of women and minorities to management and decisionmaking positions in business.

(b) Report.—Not later than 15 months after the date of the enactment of this Act, the Commission shall prepare and submit to the President and the appropriate committees of Congress a written report containing—

(1) the findings and conclusions of the Commission resulting from the study conducted under subsection (a); and

(2) recommendations based on the findings and conclusions described in paragraph (1) relating to the promotion of opportunities for, and elimination of artificial barriers to, the advancement of women and minorities to management and decisionmaking positions in business, including recommendations for—

(A) policies and practices to fill vacancies at the management and decisionmaking levels;

(B) developmental practices and procedures to ensure that women and minorities have access to opportunities to gain the exposure, skills, and expertise necessary to assume management and decisionmaking positions;

(C) compensation programs and reward structures utilized to reward and retain key employees; and

(D) the use of enforcement (including such enforcement techniques as litigation, complaint investigations, compliance reviews, conciliation, administrative regulations, policy guidance, technical assistance, training, and public education) of Federal equal employment opportunity laws by Federal agencies as a means of eliminating artificial barriers to the advancement of women and minorities in employment.

(c) Additional Study.—The Commission may conduct such additional study of the advancement of women and minorities to management and decisionmaking positions in business as a majority of the members of the Commission determines to be necessary.

SEC. 205. ESTABLISHMENT OF THE NATIONAL AWARD FOR DIVERSITY AND EXCELLENCE IN AMERICAN EXECUTIVE MANAGEMENT.

(a) In General.—There is established the National Award for Diversity and Excellence in American Executive Management, which shall be evidenced by a medal bearing the inscription "Frances Perkins-Elizabeth Hanford Dole National Award for Diversity and Excellence in American Executive Management". The medal shall be of such design and materials, and bear such additional inscriptions, as the Commission may prescribe.

(b) Criteria for Qualification.—To qualify to receive an award under this section a business shall—

(1) submit a written application to the Commission, at such time, in such manner, and containing such information as the Commission may require, including at a minimum information that demonstrates that the business has made substantial effort to promote the opportunities and developmental experiences of women and minorities to foster advancement to management and decisionmaking positions within the business, including the elimination of artificial barriers to the advancement of women and minorities, and deserves special recognition as a consequence; and

(2) meet such additional requirements and specifications as the Commission determines to be appropriate.

(c) Making and Presentation of Award.—

(1) Award.—After receiving recommendations from the Commission, the President or the designated representative of the President shall annually present the award described in subsection (a) to businesses that meet the qualifications described in subsection (b).

(2) Presentation.—The President or the designated representative of the President shall present the award with such ceremonies as the President or the designated representative of the President may determine to be appropriate.

(3) Publicity.—A business that receives an award under this section may publicize the receipt of the award and use the award in its advertising, if the business agrees to help other United States businesses improve with respect to the promotion of opportunities and developmental experiences of women and minorities to foster the advancement of women and minorities to management and decisionmaking positions.

(d) Business.—For the purposes of this section, the term 'business' includes—

(1)(A) a corporation, including nonprofit corporations;

(B) a partnership;

(C) a professional association;

(D) a labor organization; and

(E) a business entity similar to an entity described in subparagraphs (A) through (D);

(2) an education referral program, a training program, such as an apprenticeship or management training program or a similar program; and

(3) a joint program formed by a combination of any entities discribed in paragraph 1 or 2.

SEC. 206. POWERS OF THE COMMISSION.

(a) In General.—The Commission is authorized to—

(1) hold such hearings and sit and act at such times;

(2) take such testimony;

(3) have such printing and binding done;

(4) enter into such contracts and other arrangements;

(5) make such expenditures; and

(6) take such other actions; as the Commission may determine to be necessary to carry out the duties of the Commission.

(b) Oaths.—Any member of the Commission may administer oaths or affirmations to witnesses appearing before the Commission.

(c) Obtaining Information from Federal Agencies.—The Commission may secure directly from any Federal agency such information as the Commission may require to carry out its duties.

(d) Voluntary Service.—Notwithstanding section 1342 of title 31, United States Code, the Chairperson of the Commission may accept for the Commission voluntary services provided by a member of the Commission.

(e) Gifts and Donations.—The Commission may accept, use, and dispose of gifts or donations of property in order to carry out the duties of the Commission.

(f) Use of Mail.—The Commission may use the United States mails in the same manner and under the same conditions as Federal agencies.

SEC. 207. CONFIDENTIALITY OF INFORMATION.

(a) Individual Business Information.—

(1) In general.—Except as provided in paragraph (2), and notwithstanding section 552 of title 5, United States Code, in carrying out the duties of the Commission, including the duties described in sections 204 and 205, the Commission shall maintain the confidentiality of all information that concerns—

(A) the employment practices and procedures of individual businesses; or

(B) individual employees of the businesses.

(2) Consent.—The content of any information described in paragraph (1) may be disclosed with the prior written consent of the business or employee, as the case may be, with respect to which the information is maintained.

(b) Aggregate Information.—In carrying out the duties of the Commission, the Commission may disclose—

(1) information about the aggregate employment practices or procedures of a class or group of businesses; and

(2) information about the aggregate characteristics of employees of the businesses, and related aggregate information about the employees.

SEC. 208. STAFF AND CONSULTANTS.

(a) Staff.—

(1) Appointment and compensation.—The Commission may appoint and determine the compensation of such staff as the Commission determines to be necessary to carry out the duties of the Commission.

(2) Limitations.—The rate of compensation for each staff member shall not exceed the daily equivalent of the rate specified for level V of the Executive Schedule under section 5316 of title 5, United States Code for each day the staff member is engaged in the performance of duties for the Commission. The Commission may otherwise appoint and determine the compensation of staff without regard to the provisions of title 5, United States Code, that govern appointments in the competitive service, and the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, that relate to classification and General Schedule pay rates.

(b) Experts and Consultants.—The Chairperson of the Commission may obtain such temporary and intermittent services of experts and consultants and compensate the experts and consultants in accordance with section 3109(b) of title 5, United States Code, as the Commission determines to be necessary to carry out the duties of the Commission.

(c) Detail of Federal Employees.—On the request of the Chairperson of the Commission, the head of any Federal agency shall detail, without reimbursement, any of the personnel of the agency to the Commission to assist the Commission in carrying out its duties. Any detail shall not interrupt or otherwise affect the civil service status or privileges of the Federal employee.

(d) Technical Assistance.—On the request of the Chairperson of the Commission, the head of a Federal agency shall provide such technical assistance to the Commission as the Commission determines to be necessary to carry out its duties.

SEC. 209. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated to the Commission such sums as may be necessary to carry out the provisions of this title. The sums shall remain available until expended, without fiscal year limitation.

SEC. 210. TERMINATION.

(a) Commission.—Notwithstanding section 15 of the Federal Advisory Committee Act (5 U.S.C. App.), the Commission shall terminate 4 years after the date of the enactment of this Act.

(b) Award.—The authority to make awards under section 205 shall terminate 4 years after the date of the enactment of this Act.

TITLE III—GOVERNMENT EMPLOYEE RIGHTS

SEC. 301. GOVERNMENT EMPLOYEE RIGHTS ACT OF 1991.

(a) Short Title.—This title may be cited as the "Government Employee Rights Act of 1991".

(b) Purpose.—The purpose of this title is to provide procedures to protect the right of Senate and other government employees, with respect to their public employment, to be free of discrimination on the basis of race, color, religion, sex, national origin, age, or disability.

(c) Definitions.—For purposes of this title:

(1) Senate employee.—The term "Senate employee" or "employee" means—

(A) any employee whose pay is disbursed by the Secretary of the Senate;

(B) any employee of the Architect of the Capitol who is assigned to the Senate Restaurants or to the Superintendent of the Senate Office Buildings;

(C) any applicant for a position that will last 90 days or more and that is to be occupied by an individual described in subparagraph (A) or (B); or

(D) any individual who was formerly an employee described in subparagraph (A) or (B) and whose claim of a violation arises out of the individual's Senate employment.

(2) Head of employing office.—The term "head of employing office" means the individual who has final authority to appoint, hire, discharge, and set the terms, conditions or privileges of the Senate employment of an employee.

(3) Violation.—The term "violation" means a practice that violates section 302 of this title.

SEC. 302. DISCRIMINATORY PRACTICES PROHIBITED.

All personnel actions affecting employees of the Senate shall be made free from any discrimination based on—

(1) race, color, religion, sex, or national origin, within the meaning of section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

(2) age, within the meaning of section 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a); or

(3) handicap or disability, within the meaning of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791) and sections 102-104 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112-14).

SEC. 303. ESTABLISHMENT OF OFFICE OF SENATE FAIR EMPLOYMENT PRACTICES.

(a) In General.—There is established, as an office of the Senate, the Office of Senate Fair Employment Practices (referred to in this title as the "Office'), which shall—

(1) administer the processes set forth in sections 305 through 307;

(2) implement programs for the Senate to heighten awareness of employee rights in order to prevent violations from occurring.

(b) Director.—

(1) In general.—The Office shall be headed by a Director (referred to in this title as the "Director') who shall be appointed by the President pro tempore, upon the recommendation of the Majority Leader in consultation with the Minority Leader. The appointment shall be made without regard to political affiliation and solely on the basis of fitness to perform the duties of the position. The Director shall be appointed for a term of service which shall expire at the end of the Congress following the Congress during which the Director is appointed. A Director may be reappointed at the termination of any term of service. The President pro tempore, upon the joint recommendation of the Majority Leader in consultation with the Minority Leader, may remove the Director at any time.

(2) Salary.—The President pro tempore, upon the recommendation of the Majority Leader in consultation with the Minority Leader, shall establish the rate of pay for the Director. The salary of the Director may not be reduced during the employment of the Director and shall be increased at the same time and in the same manner as fixed statutory salary rates within the Senate are adjusted as a result of annual comparability increases.

(3) Annual budget.—The Director shall submit an annual budget request for the Office to the Committee on Appropriations.

(4) Appointment of director.—The first Director shall be appointed and begin service within 90 days after the date of enactment of this Act, and thereafter the Director shall be appointed and begin service within 30 days after the beginning of the session of the Congress immediately following the termination of a Director's term of service or within 60 days after a vacancy occurs in the position.

(c) Staff of the Office.—

(1) Appointment.—The Director may appoint and fix the compensation of such additional staff, including hearing officers, as are necessary to carry out the purposes of this title.

(2) Detailees.—The Director may, with the prior consent of the Government department or agency concerned and the Committee on Rules and Administration, use on a reimbursable or nonreimbursable basis the services of any such department or agency, including the services of members or personnel of the General Accounting Office Personnel Appeals Board.

(3) Consultants.—In carrying out the functions of the Office, the Director may procure the temporary (not to exceed 1 year) or intermittent services of individual consultants, or organizations thereof, in the same manner and under the same conditions as a standing committee of the Senate may procure such services under section 202(i) of the Legislative Reorganization Act of 1946 (2 U.S.C. 72a(i)).

(d) Expenses of the Office.—In fiscal year 1992, the expenses of the Office shall be paid out of the Contingent Fund of the Senate from the appropriation account Miscellaneous Items. Beginning in fiscal year 1993, and for each fiscal year thereafter, there is authorized to be appropriated for the expenses of the Office such sums as shall be necessary to carry out its functions. In all cases, expenses shall be paid out of the Contingent Fund of the Senate upon vouchers approved by the Director, except that a voucher shall not be required for—

(1) the disbursement of salaries of employees who are paid at an annual rate;

(2) the payment of expenses for telecommunications services provided by the Telecommunications Department, Sergeant at Arms, United States Senate;

(3) the payment of expenses for stationery supplies purchased through the Keeper of the Stationery, United States Senate;

(4) the payment of expenses for postage to the Postmaster, United States Senate; and

(5) the payment of metered charges on copying equipment provided by the Sergeant at Arms, United States Senate. The Secretary of the Senate is authorized to advance such sums as may be necessary to defray the expenses incurred in carrying out this title. Expenses of the Office shall include authorized travel for personnel of the Office.

(e) Rules of the Office.—The Director shall adopt rules governing the procedures of the Office, including the procedures of hearing boards, which rules shall be submitted to the President pro tempore for publication in the Congressional Record. The rules may be amended in the same manner. The Director may consult with the Chairman of the Administrative Conference of the United States on the adoption of rules.

(f) Representation by the Senate Legal Counsel.—For the purpose of representation by the Senate Legal Counsel, the Office shall be deemed a committee, within the meaning of title VII of the Ethics in Government Act of 1978 (2 U.S.C. 288, et seq.).

SEC. 304. SENATE PROCEDURE FOR CONSIDERATION OF ALLEGED VIOLATIONS.

The Senate procedure for consideration of alleged violations consists of 4 steps as follows:

(1) Step I, counseling, as set forth in section 305.

(2) Step II, mediation, as set forth in section 306.

(3) Step III, formal complaint and hearing by a hearing board, as set forth in section 307.

(4) Step IV, review of a hearing board decision, as set forth in section 308 or 309.

SEC. 305. STEP I: COUNSELING.

(a) In General.—A Senate employee alleging a violation may request counseling by the Office. The Office shall provide the employee with all relevant information with respect to the rights of the employee. A request for counseling shall be made not later than 180 days after the alleged violation forming the basis of the request for counseling occurred. No request for counseling may be made until 10 days after the first Director begins service pursuant to section 303(b)(4).

(b) Period of Counseling.—The period for counseling shall be 30 days unless the employee and the Office agree to reduce the period. The period shall begin on the date the request for counseling is received.

(c) Employees of the Architect of the Capitol and Capitol Police.—In the case of an employee of the Architect of the Capitol or an employee who is a member of the Capitol Police, the Director may refer the employee to the Architect of the Capitol or the Capitol Police Board for resolution of the employee's complaint through the internal grievance procedures of the Architect of the Capitol or the Capitol Police Board for a specific period of time, which shall not count against the time available for counseling or mediation under this title.

SEC. 306. STEP II: MEDIATION.

(a) In General.—Not later than 15 days after the end of the counseling period, the employee may file a request for mediation with the Office. Mediation may include the Office, the employee, and the employing office in a process involving meetings with the parties separately or jointly for the purpose of resolving the dispute between the employee and the employing office.

(b) Mediation Period.—The mediation period shall be 30 days beginning on the date the request for mediation is received and may be extended for an additional 30 days at the discretion of the Office. The Office shall notify the employee and the head of the employing office when the mediation period has ended.

SEC. 307. STEP III: FORMAL COMPLAINT AND HEARING.

(a) Formal Complaint and Request for Hearing.—Not later than 30 days after receipt by the employee of notice from the Office of the end of the mediation period, the Senate employee may file a formal complaint with the Office. No complaint may be filed unless the employee has made a timely request for counseling and has completed the procedures set forth in sections 305 and 306.

(b) Hearing Board.—A board of 3 independent hearing officers (referred to in this title as "hearing board"), who are not Senators or officers or employees of the Senate, chosen by the Director (one of whom shall be designated by the Director as the presiding hearing officer) shall be assigned to consider each complaint filed under this section. The Director shall appoint hearing officers after considering any candidates who are recommended to the Director by the Federal Mediation and Conciliation Service, the Administrative Conference of the United States, or organizations composed primarily of individuals experienced in adjudicating or arbitrating personnel matters. A hearing board shall act by majority vote.

(c) Dismissal of Frivolous Claims.—Prior to a hearing under subsection (d), a hearing board may dismiss any claim that it finds to be frivolous.

(d) Hearing.—A hearing shall be conducted—

(1) in closed session on the record by a hearing board;

(2) no later than 30 days after filing of the complaint under subsection (a), except that the Office may, for good cause, extend up to an additional 60 days the time for conducting a hearing; and

(3) except as specifically provided in this title and to the greatest extent practicable, in accordance with the principles and procedures set forth in sections 554 through 557 of title 5, United States Code.

(e) Discovery.—Reasonable prehearing discovery may be permitted at the discretion of the hearing board.

(f) Subpoena.—

(1) Authorization.—A hearing board may authorize subpoenas, which shall be issued by the presiding hearing officer on behalf of the hearing board, for the attendance of witnesses at proceedings of the hearing board and for the production of correspondence, books, papers, documents, and other records.

(2) Objections.—If a witness refuses, on the basis of relevance, privilege, or other objection, to testify in response to a question or to produce records in connection with the proceedings of a hearing board, the hearing board shall rule on the objection. At the request of the witness, the employee, or employing office, or on its own initiative, the hearing board may refer the objection to the Select Committee on Ethics for a ruling.

(3) Enforcement.—The Select Committee on Ethics may make to the Senate any recommendations by report or resolution, including recommendations for criminal or civil enforcement by or on behalf of the Office, which the Select Committee on Ethics may consider appropriate with respect to—

(A) the failure or refusal of any person to appear in proceedings under this or to produce records in obedience to a subpoena or order of the hearing board; or

(B) the failure or refusal of any person to answer questions during his or her appearance as a witness in a proceeding under this section. For purposes of section 1365 of title 28, United States Code, the Office shall be deemed to be a committee of the Senate.

(g) Decision.—The hearing board shall issue a written decision as expeditiously as possible, but in no case more than 45 days after the conclusion of the hearing.

The written decision shall be transmitted by the Office to the employee and the employing office. The decision shall state the issues raised by the complaint, describe the evidence in the record, and contain a determination as to whether a violation has occurred.

(h) Remedies.—If the hearing board determines that a violation has occurred, it shall order such remedies as would be appropriate if awarded under section 706 (g) and (k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5 (g) and (k)), and may also order the award of such compensatory damages as would be appropriate if awarded under section 1977 and section 1977A (a) and (b)(2) of the Revised Statutes (42 U.S.C. 1981 and 1981A (a) and (b)(2)). In the case of a determination that a violation based on age has occurred, the hearing board shall order such remedies as would be appropriate if awarded under section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)). Any order requiring the payment of money must be approved by a Senate resolution reported by the Committee on Rules and Administration. The hearing board shall have no authority to award punitive damages.

(i) Precedent and Interpretations.—Hearing boards shall be guided by judicial decisions under statutes referred to in section 302 and subsection (h) of this section, as well as the precedents developed by the Select Committee on Ethics under section 308, and other Senate precedents.

SEC. 308. REVIEW BY THE SELECT COMMITTEE ON ETHICS.

(a) In General.—An employee or the head of an employing office may request that the Select Committee on Ethics (referred to in this section as the "Committee"), or such other entity as the Senate may designate, review a decision under section 307, including any decision following a remand under subsection (c), by filing a request for review with the Office not later than 10 days after the receipt of the decision of a hearing board. The Office, at the discretion of the Director, on its own initiative and for good cause, may file a request for review by the Committee of a decision of a hearing board not later than 5 days after the time for the employee or employing office to file a request for review has expired. The Office shall transmit a copy of any request for review to the Committee and notify the interested parties of the filing of the request for review.

(b) Review.—Review under this section shall be based on the record of the hearing board. The Committee shall adopt and publish in the Congressional Record procedures for requests for review under this section.

(c) Remand.—Within the time for a decision under subsection (d), the Committee may remand a decision no more than one time to the hearing board for the purpose of supplementing the record or for further consideration.

(d) Final Decision.—

(1) Hearing board.—If no timely request for review is filed under subsection (a), the Office shall enter as a final decision, the decision of the hearing board.

(2) Select Committee on Ethics.—

(A) If the Committee does not remand under subsection (c), it shall transmit a written final decision to the Office for entry in the records of the Office. The Committee shall transmit the decision not later than 60 calendar days during which the Senate is in session after the filing of a request for review under subsection (a). The Committee may extend for 15 calendar days during which the Senate is in session the period for transmission to the Office of a final decision.

(B) The decision of the hearing board shall be deemed to be a final decision, and entered in the records of the Office as a final decision, unless a majority of the Committee votes to reverse or remand the decision of the hearing board within the time for transmission to the Office of a final decision.

(C) The decision of the hearing board shall be deemed to be a final decision, and entered in the records of the Office as a final decision, if the Committee, in its discretion, decides not to review, pursuant to a request for review under subsection (a), a decision of the hearing board, and notifies the interested parties of such decision.

(3) Entry of a final decision.—The entry of a final decision in the records of the Office shall constitute a final decision for purposes of judicial review under section 309.

(e) Statement of Reasons.—Any decision of the Committee under subsection (c) or subsection (d)(2)(A) shall contain a written statement of the reasons for the Committee's decision.

SEC. 309. JUDICIAL REVIEW.

(a) In General.—Any Senate employee aggrieved by a final decision under section 308(d), or any Member of the Senate who would be required to reimburse the appropriate Federal account pursuant to the section entitled "Payments by the President or a Member of the Senate" and a final decision entered pursuant to section 308(d)(2)(B), may petition for review by the United States Court of Appeals for the Federal Circuit.

(b) Law Applicable.—Chapter 158 of title 28, United States Code, shall apply to a review under this section except that—

(1) with respect to section 2344 of title 28, United States Code, service of the petition shall be on the Senate Legal Counsel rather than on the Attorney General;

(2) the provisions of section 2348 of title 28, United States Code, on the authority of the Attorney General, shall not apply;

(3) the petition for review shall be filed not later than 90 days after the entry in the Office of a final decision under section 308(d);

(4) the Office shall be an "agency" as that term is used in chapter 158 of title 28, United States Code; and

(5) the Office shall be the respondent in any proceeding under this section.

(c) Standard of Review.—To the extent necessary to decision and when presented, the court shall decide all relevant questions of law and interpret constitutional and statutory provisions. The court shall set aside a final decision if it is determined that the decision was—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;

(2) not made consistent with required procedures; or

(3) unsupported by substantial evidence. In making the foregoing determinations, the court shall review the whole record, or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. The record on review shall include the record before the hearing board, the decision of the hearing board, and the decision, if any, of the Select Committee on Ethics.

(d) Attorney's Fees.—If an employee is the prevailing party in a proceeding under this section, attorney's fees may be allowed by the court in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

SEC. 310. RESOLUTION OF COMPLAINT.

If, after a formal complaint is filed under section 307, the employee and the head of the employing office resolve the issues involved, the employee may dismiss the complaint or the parties may enter into a written agreement, subject to the approval of the Director.

SEC. 311. COSTS OF ATTENDING HEARINGS.

Subject to the approval of the Director, an employee with respect to whom a hearing is held under this title may be reimbursed for actual and reasonable costs of attending proceedings under sections 307 and 308, consistent with Senate travel regulations. Senate Resolution 259, agreed to August 5, 1987 (100th Congress, 1st Session), shall apply to witnesses appearing in proceedings before a hearing board.

SEC. 312. PROHIBITION OF INTIMIDATION.

Any intimidation of, or reprisal against, any employee by any Member, officer, or employee of the Senate, or by the Architect of the Capitol, or anyone employed by the Architect of the Capitol, as the case may be, because of the exercise of a right under this title constitutes an unlawful employment practice, which may be remedied in the same manner under this title as is a violation.

SEC. 313. CONFIDENTIALITY.

(a) Counseling.—All counseling shall be strictly confidential except that the Office and the employee may agree to notify the head of the employing office of the allegations.

(b) Mediation.—All mediation shall be strictly confidential.

(c) Hearings.—Except as provided in subsection (d), the hearings, deliberations, and decisions of the hearing board and the Select Committee on Ethics shall be confidential.

(d) Final Decision of Select Committee on Ethics.—The final decision of the Select Committee on Ethics under section 308 shall be made public if the decision is in favor of the complaining Senate employee or if the decision reverses a decision of the hearing board which had been in favor of the employee. The Select Committee on Ethics may decide to release any other decision at its discretion. In the absence of a proceeding under section 308, a decision of the hearing board that is favorable to the employee shall be made public.

(e) Release of Records for Judicial Review.—The records and decisions of hearing boards, and the decisions of the Select Committee on Ethics, may be made public if required for the purpose of judicial review under section 309.

SEC. 314. EXERCISE OF RULEMAKING POWER.

The provisions of this title, except for sections 309, 320, 321, and 322, are enacted by the Senate as an exercise of the rulemaking power of the Senate, with full recognition of the right of the Senate to change its rules, in the same manner, and to the same extent, as in the case of any other rule of the Senate. Notwithstanding any other provision of law, except as provided in section 309, enforcement and adjudication with respect to the discriminatory practices prohibited by section 302, and arising out of Senate employment, shall be within the exclusive jurisdiction of the United States Senate.

SEC. 315. TECHNICAL AND CONFORMING AMENDMENTS.

Section 509 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12209) is amended—

(1) in subsection (a)—

(A) by striking paragraphs (2) through (5);

(B) by redesignating paragraphs (6) and (7) as paragraphs (2) and (3), respectively; and

(C) in paragraph (3), as redesignated by subparagraph (B) of this paragraph—

(i) by striking "(2) and (6)(A)" and inserting "(2)(A)', as redesignated by subparagraph (B) of this paragraph; and

(ii) by striking "(3), (4), (5), (6)(B), and (6)(C)" and inserting "(2)'; and

(2) in subsection (c)(2), by inserting ", except for the employees who are defined as Senate employees, in section 201(c)(1) of the Civil Rights Act of 1991)" after "shall apply exclusively".

SEC. 316. POLITICAL AFFILIATION AND PLACE OF RESIDENCE.

(a) In General.—It shall not be a violation with respect to an employee described in subsection (b) to consider the—

(1) party affiliation;

(2) domicile; or

(3) political compatibility with the employing office, of such an employee with respect to employment decisions.

(b) Definition.—For purposes of this section, the term "employee" means—

(1) an employee on the staff of the Senate leadership;

(2) an employee on the staff of a committee or subcommittee;

(3) an employee on the staff of a Member of the Senate;

(4) an officer or employee of the Senate elected by the Senate or appointed by a Member, other than those described in paragraphs (1) through (3); or

(5) an applicant for a position that is to be occupied by an individual described in paragraphs (1) through (4).

SEC. 317. OTHER REVIEW.

No Senate employee may commence a judicial proceeding to redress discriminatory practices prohibited under section 302 of this title, except as provided in this title.

SEC. 318. OTHER INSTRUMENTALITIES OF THE CONGRESS.

It is the sense of the Senate that legislation should be enacted to provide the same or comparable rights and remedies as are provided under this title to employees of instrumentalities of the Congress not provided with such rights and remedies.

SEC. 319. RULE XLII OF THE STANDING RULES OF THE SENATE.

(a) Reaffirmation.—The Senate reaffirms its commitment to Rule XLII of the Standing Rules of the Senate, which provides as follows:

"No Member, officer, or employee of the Senate shall, with respect to employment by the Senate or any office thereof—

"(a) fail or refuse to hire an individual;

"(b) discharge an individual; or

"(c) otherwise discriminate against an individual with respect to promotion, compensation, or terms, conditions, or privileges of employment on the basis of such individual's race, color, religion, sex, national origin, age, or state of physical handicap.".

(b) Authority To Discipline.—Notwithstanding any provision of this title, including any provision authorizing orders for remedies to Senate employees to redress employment discrimination, the Select Committee on Ethics shall retain full power, in accordance with its authority under Senate Resolution 338, 88th Congress, as amended, with respect to disciplinary action against a Member, officer, or employee of the Senate for a violation of Rule XLII.

SEC. 320. COVERAGE OF PRESIDENTIAL APPOINTEES.

(a) In General.—

(1) Application.—The rights, protections, and remedies provided pursuant to section 302 and 307(h) of this title shall apply with respect to employment of Presidential appointees.

(2) Enforcement by administrative action.—Any Presidential appointee may file a complaint alleging a violation not later than 180 days after the occurrence of the alleged violation, with the Equal Employment Opportunity Commission, or such other entity as is designated by the President by Executive Order, which, in accordance with the principles and procedures set forth in sections 554 through 557 of title 5, United States Code, shall determine whether a violation has occurred and shall set forth its determination in a final order. If the Equal Employment Opportunity Commission, or such

other entity as is designated by the President pursuant to this section, determines that a violation has occurred, the final order shall also provide for appropriate relief.

(3) Judicial review.—

(A) In general.—Any party aggrieved by a final order under paragraph (2) may petition for review by the United States Court of Appeals for the Federal Circuit.

(B) Law applicable.—Chapter 158 of title 28, United States Code, shall apply to a review under this section except that the Equal Employment Opportunity Commission or such other entity as the President may designate under paragraph (2) shall be an "agency" as that term is used in chapter 158 of title 28, United States Code.

(C) Standard of review.—To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law and interpret constitutional and statutory provisions. The court shall set aside a final order under paragraph (2) if it is determined that the order was—

(i) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;

(ii) not made consistent with required procedures; or

(iii) unsupported by substantial evidence. In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(D) Attorney's fees.—If the presidential appointee is the prevailing party in a proceeding under this section, attorney's fees may be allowed by the court in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

(b) Presidential Appointee.—For purposes of this section, the term "Presidential appointee" means any officer or employee, or an applicant seeking to become an officer or employee, in any unit of the Executive Branch, including the Executive Office of the President, whether appointed by the President or by any other appointing authority in the Executive Branch, who is not already entitled to bring an action under any of the statutes referred to in section 302 but does not include any individual—

(1) whose appointment is made by and with the advice and consent of the Senate;

(2) who is appointed to an advisory committee, as defined in section 3(2) of the Federal Advisory Committee Act (5 U.S.C. App.); or

(3) who is a member of the uniformed services.

SEC. 321. COVERAGE OF PREVIOUSLY EXEMPT STATE EMPLOYEES.

(a) Application.—The rights, protections, and remedies provided pursuant to section 302 and 307(h) of this title shall apply with respect to employment of any individual chosen or appointed, by a person elected to public office in any State or political subdivision of any State by the qualified voters thereof—

(1) to be a member of the elected official's personal staff;

(2) to serve the elected official on the policymaking level; or

(3) to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

(b) Enforcement by Administrative Action.

(1) In General. —Any individual referred to in subsection (a) may file a complaint alleging a violation, not later than 180 days after the occurrence of the alleged violation with the Equal Employment Opportunity Commission, which, in accordance with the principles and procedures set forth in sections 554 through 557 of title 5, United States Code, shall determine whether a violation has occurred and shall set forth its determination in a final order. If the Equal Employment Opportunity Commission determines that a violation has occurred, the final order shall also provide for appropriate relief.

(2) Referral to State And Local Authorities. —

(A) Application. —Section 706(d) of the Civil Rights Act of 1964 (42 U.S.C. 20003-5(d)) shall apply with respect to any proceeding under this section.

(B) Definition. —For purposes of the application described in subparagraph (A), the term 'any charge filed by a member of the Commission alleging an unlawful practice' means a complaint filed under this section.

(c) Judicial Review.—Any party aggrieved by a final order under subsection (b) may obtain a review of such order under chapter 158 of title 28, United States Code. For the purpose of this review, the Equal Employment Opportunity Commission shall be an "agency" as that term is used in chapter 158 of title 28, United States Code.

(d) Standard of Review.—To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law and interpret constitutional and statutory provisions. The court shall set aside a final order under subsection (b) if it is determined that the order was—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;

(2) not made consistent with required procedures; or

(3) unsupported by substantial evidence. In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(e) Attorney's Fees.—If the individual referred to in subsection (a) is the prevailing party in a proceeding under this subsection, attorney's fees may be allowed by the court in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

SEC. 322. SEVERABILITY.

Notwithstanding section 401 of this Act, if any provision of section 309 or 320(a)(3) is invalidated, both sections 309 and 320(a)(3) shall have no force and effect.

SEC. 323. PAYMENTS BY THE PRESIDENT OR A MEMBER OF THE SENATE.

The President or a Member of the Senate shall reimburse the appropriate Federal account for any payment made on his or her behalf out of such account for a violation committed under the provisions of this title by the President or Member of the Senate not later than 60 days after the payment is made.

SEC. 324. REPORTS OF SENATE COMMITTEES.

(a) Each report accompanying a bill or joint resolution of a public character reported by any committee of the Senate (except the Committee on Appropriations and the Committee on the Budget) shall contain a listing of the provisions of the bill or joint resolution that apply to Congress and an evaluation of the impact of such provisions on Congress.

(b) The provisions of this section are enacted by the Senate as an exercise of the rulemaking power of the Senate, with full recognition of the right of the Senate to change its rules, in the same manner, and to the same extent, as in the case of any other rule of the Senate.

SEC. 325. INTERVENTION AND EXPEDITED REVIEW OF CERTAIN APPEALS.

(a) Intervention.—Because of the constitutional issues that may be raised by section 309 and section 320, any Member of the Senate may intervene as a matter of right in any proceeding under section

309 for the sole purpose of determining the constitutionality of such section.

(b) Threshold Matter.—In any proceeding under section 309 or section 320, the United States Court of Appeals for the Federal Circuit shall determine any issue presented concerning the constitutionality of such section as a threshold matter.

(c) Appeal.—

(1) In general.—An appeal may by taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order issued by the United States Court of Appeals for the Federal Circuit ruling upon the constitutionality of section 309 or 320.

(2) Jurisdiction.—The Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction over the appeal referred to in paragraph (1), advance the appeal on the docket and expedite the appeal to the greatest extent possible.

TITLE IV—GENERAL PROVISIONS

SEC. 401. SEVERABILITY.

If any provision of this Act, or an amendment made by this Act, or the application of such provision to any person or circumstances is held to be invalid, the remainder of this Act and the amendments made by this Act, and the application of such provision to other persons and circumstances, shall not be affected.

SEC. 402. EFFECTIVE DATE.

(a) In General. — Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.

(b) Certain Disparate Impact Cases. — Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.

TITLE V—CIVIL WAR SITES ADVISORY COMMISSION

SEC. 501. CIVIL WAR SITES ADVISORY COMMISSION.

Section 1205 of Public Law 101-628 is amended in subsection (a) by—

(1) striking "Three" in paragraph (4) and inserting "Four" in lieu thereof; and

(2) striking "Three" in paragraph (5) and inserting "Four" in lieu thereof.

Title VII of the Civil Rights Act of 1964

Following is the text of Title VII of the Civil Rights Act of 1964, the most frequently cited statute in EEO law, which prohibits discrimination on the basis of race, color, religion, sex, or national origin by employers that are engaged in an industry affecting commerce and that have 15 or more employees. Codified as 42 U.S.C. §2000e, the statute reads as amended by the Civil Rights Act of 1991, as passed by Congress November 7, 1991.

TITLE VII
NONDISCRIMINATION IN EMPLOYMENT

Sec. 2000e. Definitions

For the purposes of this subchapter —

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

[1972 Amendments: Section 701(a) was amended by P.L. 92-261, eff. March 24, 1972, expanding term "person" to include "governments, governmental agencies, political subdivisions ..."]

[1978 Amendments. Section 701(a) was amended by P.L. 95-598 to change the phrase "trustees in bankruptcy" to "trustees in cases under Title 11," eff. Oct. 1, 1979.]

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5 or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

[1972 Amendments: Section 701(b) was amended by P.L. 92-261, eff. March 24, 1972, expanding "employer" to include all state and local "governments, governmental agencies, political subdivisions ...", but does not include departments or agencies of the District of Columbia who are subject to competitive service under provisions of 5 U.S.C. Section 2102. Effective March 24, 1972, the number of employees was changed from "twenty-five" to "fifteen".]

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

[1972 Amendments: Section 701(c) was amended by P.L. 92-261, eff. March 24, 1972, to reflect the changes made in Sections 701(a) and 701(b), and the following language deleted from the end of subsection (c): "... but shall not include an agency of the United States, or an agency of a State or political subdivision of a State, except that such term shall include the United States Employment Service and the system of state and local employment service receiving Federal assistance."]

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization—

[1972 Amendments: Section 701(e) was amended by P.L. 92-261, eff. March 24, 1972, and previously read: "... (A) one hundred or more during the first year after the effective date prescribed in subsection (a) of section 716, (B) seventy-five or more during the second year after such date or fifty or more during the third year, or (C) twenty-five or more thereafter, and such labor organizations—".]

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) has the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

[Section 2000e(f) amended by Civil Rights Act of 1991. S. 1745]

[1972 Amendments: Section 701(f) was amended by P.L. 92-261, eff. March 24, 1972, and added exceptions and exclusions to term "employee".]

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity.

[1972 Amendments: Section 701(h) was amended by P.L. 92-261, eff. March 24, 1972, and added the following inclusions: ". . . and further includes any governmental industry, business, or activity."]

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

[1972 Amendments: Subsection (j) added to Section 701 by P.L. 92-261, eff. March 24, 1972, creating statutory basis for EEOC to form guidelines on religious-based discrimination.]

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

[1978 Amendments: Section 701(k) was added by P.L. 95-555, eff. October 31, 1978, except that employers will have until April 29, 1979 to make necessary adjustments in existing fringe benefit or insurance programs. Also, employers must wait until October 31, 1979, or until the expiration of an applicable collective bargaining contract, before they may reduce benefits under a current plan in order to comply with the amendment. EEOC issued interpretive Questions and Answers on P.L. 95-555 as an Appendix to its Sex Discrimination Guidelines (29 CFR 1604.10), 44 FR 1196 (March 2, 1979) eff. March 9, 1979.]

(l) The term 'complaining party' means the Commission, the Attorney General, or a person who may bring an action or proceeding under this title.

(m) The term 'demonstrates' means meets the burdens of production and persuasion.

(n) The term 'respondent' means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 717.

[Section 2000e amended by Civil Rights Act of 1991. S. 1745]

Sec. 2000e-1. Subchapter not Applicable to Employment of Aliens Outside State and Individuals for Performance of Activities of Religious Corporations, Associations, Educational Institutions, or Societies

(a) This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(b) It shall not be unlawful under section 703 or 704 for an employer (or a corporation controlled by an employer), labor organization, employment agency, or joint management committee controlling apprenticeship or other training or retraining (including on-the-job training programs) to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation), such organization, such agency, or such committee to violate the law of the foreign country in which such workplace is located.

(c)(1) If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by section 703 or 704 engaged in by such corporation shall be presumed to be engaged in by such employer.

(2) Sections 703 and 704 shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(3) For purposes of this subsection, the determination of whether an employer controls a corporation shall be based on—

(A) the interrelation of operations;

(B) the common management;

(C) the centralized control of labor relations; and

(D) the common ownership or financial control, of the employer and the corporation.

[1972 Amendments: Section 702 was amended by P.L. 92-261, eff. March 24, 1972, and previously read: "Sec. 702. This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution."]

[Section 2000e-1 amended by Civil Rights Act of 1991. S. 1745]

Sec. 2000e-2. Unlawful Employment Practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

[1972 Amendments: Sec. 703(a)(2) was amended by P.L. 92-261, eff. March

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24, 1972, and added the words "applicants for employment".]

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

[1972 Amendments: Sec. 703(c)(2) was amended by P.L. 92-261, eff. March 24, 1972, and added the words "applicants for membership".]

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ an individual for any position, for an employer to discharge an individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if —

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin; nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206 (d) of Title 29.

(i) Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number of percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k)(1)(A) An unlawful employment practice based on disparate impact is established under this title only if–

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative employment practice'.

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this title.

(3) Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n)(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws–

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had–

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to–

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28, United States Code. [Section 2000e-2 amended by Civil Rights Act of 1991. S. 1745]

Sec. 2000e-3. Other Unlawful Employment Practices

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

[1972 Amendments: Section 704(a) was amended by P.L. 92-261, eff. March 24, 1972, reflecting earlier amendments in the Title, and added the following language: "..., or joint labor-management committee controlling apprenticeship or other training or retraining including on-the-job training programs".]

(b) It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee, indicating any preference, limitation, specification, or discrimination, based on race, color, religion sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

[1972 Amendments: Section 704(b) was amended by P.L. 92-261, eff. March 24, 1972, reflecting earlier amendments in the Title, and added certain language to include other organizations and methods relating to job referrals.]

Sec. 2000e-4. Equal Employment Opportunity Commission

(a) There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not

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more than three of whom shall be members of the same political party. Members of the Commission shall be appointed by the President by and with the advice and consent of the Senate for a term of five years. Any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed, and all members of the Commission shall continue to serve until their successors are appointed and qualified, except that no such member of the Commission shall continue to serve (1) for more than sixty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted. The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman. The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and, except as provided in subsection (b) of this section, shall appoint, in accordance with the provisions of Title 5 governing appointments in the competitive service, such officers, agents, attorneys, administrative law judges, and employees as he deems necessary to assist it in the performance of its functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of Title 5, relating to classification and General Schedule pay rates: *Provided*, That assignment, removal, and compensation of administrative law judges shall be in accordance with sections 3105, 3344, 5372, and 7521 of Title 5.

(b)(1) There shall be a General Counsel of the Commission appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel shall have responsibility for the conduct of litigation as provided in sections 2000e-5 and 2000e-6 of this title. The General Counsel shall have such other duties as the Commission may prescribe or as may be provided by law and shall concur with the Chairman of the Commission on the appointment and supervision of regional attorneys. The General Counsel of the Commission on the effective date of this Act shall continue in such position and perform the functions specified in this subsection until a successor is appointed and qualified.

(2) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court, provided that the Attorney General shall conduct all litigation to which the Commission is a party in the Supreme Court pursuant to this subchapter.

[1972 Amendments: Subsection (b) added by P.L. 92-261, eff. March 24, 1972, providing for the appointment of EEOC General Counsel and representation by its attorneys in all cases to which the Commission is a party.]

[Subsections (3) and (h) repealed by P.L. 92-261.]

[Subsections (b), (c), (d), (i), and (j) redesignated subsections (c), (d), (e), (h), and (i) respectively.]

[1978 Amendments: Subsection (a) amended to change hearing examiners to administrative law judges by P.L. 95-251, eff. March 27, 1978.]

(c) A vacancy in the Commission shall not impair the right of the remaining members to exercise all the powers of the Commission and three members thereof shall constitute a quorum.

(d) The Commission shall have an official seal which shall be judicially noticed.

(e) The Commission shall at the close of each fiscal year report to the Congress and to the President concerning the action it has taken, and the moneys it has disbursed. It shall make such further reports on the cause of and means of eliminating discrimination and such recommendations for further legislation as may appear desirable.

[1975 Amendments: Section 705(e) was amended by P.L. 93-608, approved January 2, 1975, and previously read: "... President concerning the action it has taken; the names, salaries, and duties of all individuals in its employ and the moneys it has disbursed; and shall make such further ...".]

(f) The principal office of the Commission shall be in or near the District of Columbia, but it may meet or exercise any or all its powers at any other place. The Commission may establish such regional or State offices as it deems necessary to accomplish the purpose of this subchapter.

(g) The Commission shall have power—

(1) to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals;

(2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;

(3) to furnish to persons subject to this subchapter such technical assistance as they may request to further their compliance with this subchapter or an order issued thereunder;

(4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this subchapter, to assist in such effectuation by conciliation or such other remedial action as is provided by this subchapter;

(5) to make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter and to make the results of such studies available to the public;

(6) to intervene in a civil action brought under section 2000e-5 of this title by an aggrieved party against a respondent other than a government, governmental agency or political subdivision. (As amended by P.L. No. 92-261, eff. March 24, 1972).

(h)(1) The Commission shall, in any of its educational or promotional activities, cooperate with other departments and agencies in the performance of such educational and promotional activities.

(2) In exercising its powers under this title, the Commission shall carry out educational and outreach activities (including dissemination of information in languages other than English) targeted to—

(A) individuals who historically have been victims of employment discrimination and have not been equitably served by the Commission; and

(B) individuals on whose behalf the Commission has authority to enforce any other law prohibiting employment discrimination, concerning rights and obligations under this title or such law, as the case may be.

[Section 2000e-4(h)(1) amended by Civil Rights Act of 1991. S. 1745]

(i) All officers, agents, attorneys, and employees of the Commission shall be subject to the provisions of section 7324 of Title 5, notwithstanding any exemption contained in such section.

(j)(1) The Commission shall establish a Technical Assistance Training Institute, through which the Commission shall provide technical assistance and training regarding the laws and regulations enforced by the Commission.

(2) An employer or other entity covered under this title shall not be excused from compliance with the requirements of this title because of any failure to receive technical assistance under this subsection.

(3) There are authorized to be appropriated to carry out this subsection such sums as may be necessary for fiscal year 1992.

[Section 2000e-4 amended by Civil Rights Act of 1991. S. 1745]

Sec. 2000e-5. Enforcement Provisions

(a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the 'respondent') within ten days and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e)(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

[Section 2000e-5(e) amended by Civil Rights Act of 1991. S. 1745]

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement

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to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting pre liminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g)(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3 (a) of this title.

[1972 Amendments: Subsections (1) through (g) of Section 706 were amended by P.L. 92-261, eff. March 24, 1972, empowering the EEOC to prevent any person from engaging in any unlawful employment practice described in Section 703 or 704; extended procedures through conciliation efforts; outlined enforcement procedures where there was no voluntary compliance; and when an action may be brought by the Federal Government, and an aggrieved party.]

(B) On a claim in which an individual proves a violation under section 703(m) and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court–

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m); and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

[Section 2000e-5(g) amended by Civil Rights Act of 1991. S. 1745]

(h) The provisions of sections 101 to 115 of Title 29 shall not apply with respect to civil actions brought under this section.

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

[1972 Amendments: Sections 706(i) and 706(j), amended by P.L. 92-261, eff. March 24, 1972, reflect prior sections' amendments and redesignations.]

(k) In any action or proceeding under this subchapter, the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person. [Section 2000e-5(k) as amended by the Civil Rights Act of 1991. S. 1745]

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Sec. 2000e-6. Civil Actions by Attorney General

(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

(c) Effective two years after March 24, 1972, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of Title 5, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

(d) Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Subsequent to March 24, 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 2000e-5 of this title.

[1972 Amendments: Subsections (c), (d), and (e) were added to Section 707 by P.L. 92-261, eff. March 24, 1972.]

Sec. 2000e-7. Effect on State Laws

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

Sec. 2000e-8. Investigations

(a) In connection with any investigation of a charge filed under section 2000e-5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

(b) The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this subchapter and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this subchapter. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this subchapter.

(c) Every employer, employment agency, and labor organization subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this subchapter which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of this subchapter, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and to furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, and, if such application for an exemption is denied, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.

(d) In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies and shall endeavor to coordinate its requirements with those adopted by such agencies. The Commission shall furnish upon request and without cost to any State or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection.

(e) It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

[1972 Amendments: As added to, and amended by P.L. 92-261, eff. March 24, 1972, Section 709(c) and (d) were expanded to provide that (1) where an employer fails or refuses to keep required records, the EEOC or Attorney General may bring an action in the district court and (2) EEOC shall endeavor to coordinate its record-keeping requirements with those of other state and Federal agencies.]

Sec. 2000e-9. Conduct of Hearings and Investigations Pursuant to Section 161 of Title 29

For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 161 of Title 29 shall apply.

[1972 Amendments: Section 710 was amended by P.L. 92-261, eff. March 24, 1972, and empowers EEOC to conduct all hearings and investigations under Section 11 of the NLRA.]

Sec. 2000e-10. Posting of Notices; Penalties

(a) Every employer, employment agency, and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts from or, summaries of, the pertinent provisions of this subchapter and information pertinent to the filing of a complaint.

(b) A willful violation of this section shall be punishable by a fine of not more than $100 for each separate offense.

Sec. 2000e-11. Veterans' Special Rights or Preference

Nothing contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

Sec. 2000e-12. Regulations; Conformity of Regulations With Administrative Procedure Provisions; Reliance on Interpretations and Instructions of Commission

(a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter. Regulations issued under this section shall be in conformity with the standards and limitations of subchapter II of chapter 5 of Title 5.

(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provi sion of this subchapter if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this subchapter regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this subchapter.

Sec. 2000e-13. Application to Personnel of Commission of Sections 111 and 1114 of Title 18; Punishment for Violation of Section 1114 of Title 18

The provisions of sections 111 and 1114, Title 18, shall apply to officers, agents, and employees of the Commission in the performance of their official duties. Notwithstanding the provisions of sections 111 and 1114 of Title 18, whoever in violation of the provisions of section 1114 of such title kills a person while engaged in or on account of the performance of his official functions under this Act shall be punished by imprisonment for any term of years or for life. (As amended by P.L. 92-261, eff. March 24, 1972)

Sec. 2000e-14. Coordination of Efforts and Elimination of Competition Among Federal Departments, Agencies, etc. in Implementation and Enforcement of Equal Employment Opportunity Legislation, Orders, and Policies; Report to President and Congress

The Equal Employment Opportunity Commission shall have the responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. On or before October 1 of each year, the Equal Employment Opportunity Commission shall transmit to the President and to the Congress a report of its activities, together with such recommendations for legislative or administrative changes as it concludes are desirable to further promote the purposes of this section.

[1972 Amendments: Section 715, previously designated "Special Study by Secretary of Labor", retitled and amended by P.L. No. 92-261, eff. March 24, 1972, established the Equal Employment Opportunity Coordinating Council and its function and purpose.]

[1978 Amendments: The Equal Employment Opportunity Council was abolished, effective July 1, 1978, pursuant to Reorganization Plan No. 1 of 1978, Sec. 6, 43 FR 19807, 92 Stat. 3781; Executive Order 12067, June 30, 1978, 43 FR 28967.]

Sec. 2000e-15. Presidential Conferences; Acquaintance of Leadership With Provisions for Employment Rights and Obligations; Plans for Fair Administration; Membership

The President shall, as soon as feasible after July 2, 1964, convene one or more conferences for the purpose of enabling the leaders of groups whose members will be affected by this subchapter to become familiar with the rights afforded and obligations imposed by its provisions, and for the purpose of making plans which will result in the fair and effective administration of this subchapter when all of its provisions become effective. The President shall invite the participation in such conference or conferences of (1) the members of the President's Committee on Equal Employment Opportunity, (2) the members of the Commission on Civil Rights, (3) representatives of State and local agencies engaged in furthering equal employment opportunity, (4) representatives of private agencies engaged in furthering equal employment opportunity, and (5) representatives of employers, labor organizations, and employment agencies who will be subject to this subchapter.

Sec. 2000e-16. Employment by Federal Government

(a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall—

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity. The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to—

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program. With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Within 90 of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant. [Section 2000e-16(c) as amended by the Civil Rights Act of 1991. S. 1745]

(d) The provisions of section 2000e-5 (f) through (k) of this title, as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.

[Section 2000e-5(d) amended by Civil Rights Act of 1991. S. 1745]

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

[1972 Amendments: As added by P.L. 92-261, eff. March 24, 1972, Section 717 provides for (1) "nondiscrimination for employees and applicants for employment in Federal agencies and in competitive service positions in the District of Columbia government, (2) gives the Civil Service Commission authority to enforce Section 717(a), and (3) enables an employee (as defined in Section 717(a)) to file a civil action in court, under the provisions of Section 706.]

[1978 Amendments: Under Reorganization Plan No. 1 of 1978, all federal EEO functions vested in the Civil Service Commission were transferred to EEOC.]

[1980 Amendment: P.L. 96-191, eff. October 1, 1980, removed the provision in Sec. 717(a) excluding the General Accounting Office from coverage of the law.]

Sec. 2000e-17. Procedure for Denial, Withholding, Termination, or Suspension of Government Contract Subsequent to Acceptance by Government of Affirmative Action Plan of Employer; Time of Acceptance of Plan

No Government contract, or portion thereof, with any employer, shall be denied, withheld, terminated, or suspended, by any agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government for the same facility within the past twelve months without first according such employer full hearing and adjudication under the provisions of section 554 of Title 5, and the following pertinent sections: *Provided*, That if such employer has deviated substantially from such previously agreed to affirmative action plan, this section shall not apply: *Provided further*, That for the purposes of this section an affirmative action plan shall be deemed to have been accepted by the Government at the time the appropriate compliance agency has accepted such plan unless within forty-five days thereafter the Office of Federal Contract Compliance has disapproved such plan.

THE CIVIL RIGHTS ACT OF 1991

Gwendolyn H. Gregory
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Following is a summary of the most important provisions in the Civil Rights Act of 1991.

SECTION 1981 THE CIVIL RIGHTS ACT OF 1872, 42 U.S.C. 1981.

I. APPLICATION TO PUBLIC ENTITIES.

Current law. In Jett v. Dallas Independent School District, 109 S.Ct. 2702 (1989), the Supreme Court held that Congress intended Section 1983 to be the exclusive remedy for actions by public officials. Therefore, Section 1981 was held not to apply to public officials.

Section 101(2) of the CRA of 1991. Covers "governmental discrimination and impairment under color of State law."

II. SCOPE OF SECTION 1981.

Current law. In Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989) the Supreme Court held that Section 1981 of the Civil Rights Act covers only discrimination in the "making" of contracts and does not cover other racial harassment.

Sec. 101(2) of the CRA of 1991. The term "make and enforce contracts" is expanded to include not only the "making" of contracts but all areas of the administration of the contract and the relationship between the parties to the contract.

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. 2000(e).

I. DAMAGES.

Current law. Compensatory and punitive damages currently are not awardable for discrimination based on sex or religion because 42 U.S.C. 1981 covers only racial discrimination and title VII currently does not allow anything other than "make whole" relief. 42 2000e-5(g).

Section 102 of the CRA of 1991. The Act amends title VII to provide that any complainant that does not have a cause of action under Section 1981 may recover compensatory and punitive damages under title VII for intentional discrimination. Punitive damages are not awardable against a "government, government agency or subdivision."

Limitation on damages (Section 5(b)).

Punitive damages against non-governmental defendants are awardable for actions taken with "malice or reckless indifference."

Compensatory and punitive damages are limited according to the size of the employer:

15 - 100 employees	$ 50,000
100 - 200 employees	$100,000
200 - 500 employees	$200,000
500 or more employees	$300,000

II. JURY TRIAL.

Current law. Title VII does not provide for a jury trial, whereas jury trials are available for suits alleging racial discrimination under Sections 1981 and 1983.

Section 102 of the CRA of 1991. This provision allows a jury trial and the jury is not to be informed of the caps on damages.

III. DISPARATE IMPACT

Shifting burdens of proof.

Current law. In Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248 (1981), the Supreme Court held that after the plaintiff makes a prima facie case of intentional employment discrimination, the employer bears only the burden of "explaining clearly the nondiscriminatory reasons for its actions." The Court ruled that the burden of "persuasion" regarding discriminatory intent remains on the plaintiff. In Wards Cove the Court held that the burden of persuasion also remains with the plaintiff in a "disparate impact" case.

Section 105 of the CRA of 1991. The Act amends the law regarding Wards Cove in "disparate impact" cases but leaves the Burdine precedent regarding intentional discrimination in place. The Act defines "demonstrates" with regard to both the plaintiff and the employer as meaning "meets the burdens of production and persuasion."

Burdens on the plaintiff and defendant.

Current law. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989). The provisions of the Civil Rights Act attempting to reverse the decision in Wards Cove were the leading issues of dispute during the Congressional debate. Wards Cove held that the plaintiffs must prove that the application of a particular policy caused statistical disparities in the workforce. Once proved, the employer has the burden of producing a business justification for the practice.

Section 105 of the CRA of 1991.

- Plaintiff's burden. The plaintiff must "demonstrate" that a "particular employment practice" results in "disparate impact," unless plaintiff "demonstrates" that the elements of the employer's "decisionmaking process are not capable of separation for analysis." "Disparate impact" is not defined in the bill.

- Employer's burden. The employer must "demonstrate" that the practice is "job related for the position in question and consistent with business necessity." The employer is also under an obligation to accept an "alternative employment practice" suggested by the plaintiff if the alternative meets the "job related . . . business necessity" test.

The Americans with Disabilities Act contains identical language in the section prohibiting practices that "screen out or tend to screen out" persons on the basis of disability. 42 U.S.C. 12112(b)(6).

Although Democrats had agreed earlier this year to amend the section on "specific practices," the final issue relating to the definition of "business necessity," was not resolved until an agreement was reached between Senate leadership and the White House on October 24, just a week before final passage of the bill. The bill vetoed by President Bush in October of last year, defined "justified by business necessity" as "the challenged practice has a manifest relationship to the employment in question or that the respondent's legitimate employment goals are significantly served by, even if they do not require, the challenged practice." President Bush objected that this language would lead to quotas. The new language is purportedly intended to reverse Wards Cove without going beyond the Supreme Court's decision in Griggs v. Duke Power Company, 401 U.S. 424 (1971).

An "Interpretive Memorandum" printed in the Congressional Record after the final compromise bill provides further guidance on the Wards Cove issue and takes the unusual posture that the memorandum is to be considered the "exclusive legislative history" for the position of the Senate on the Wards Cove issue. Section 105(b) of the Act provides:

> No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying any provision of this Act that relates to Wards Cove--Business necessity/cumulation/ alternative business practice.

The interpretive memorandum is as follows:

> The final compromise on S. 1745 agreed to by several Senate sponsors, including Senators Danforth, Kennedy, and Dole, and the Administration states that with

respect to Wards Cove--Business necessity/cumulation/alternative business practice--the exclusive legislative history is as follows:

> The terms "business necessity" and "job related" are intended to reflect the concepts enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).
>
> When a decision-making process includes particular, functionally-integrated practices which are components of the same criterion, standard, method of administration, or test, such as the height and weight requirements designed to measure strength in Dothard v. Rawlinson, 433 U.S. 321 (1977), the particular, functionally-integrated practices may be analyzed as one employment practice.

IV. TEST "NORMING".

Section 196 of the CRA of 1991. This provision makes unlawful any employment practice to "adjust the scores, use different cutoff scores for, or otherwise alter the results of employment related tests" on the basis of race, color, religion, sex, or national origin.

V. MIXED MOTIVES.

Current law. In Price Waterhouse v. Hopkins, 109 S.Ct. 1775 (1989) the High Court held that where there is "substantial evidence" that an employment decision was based on discriminatory criteria, the burden of persuasion shifts to the employer to prove that the decision would have been justified wholly on legitimate grounds.

Section 107 of the CRA of 1991. An unlawful employment practice is established if the plaintiff "demonstrates" that race, sex, color, religion or national origin was a "motivating factor . . . even though other factors also motivated the practice."

> Where the employer "demonstrates" that it would have taken the action anyway, the court may grant "declaratory relief, injunctive relief . . . and attorney's fees and costs demonstrated to be directly attributable only" to the unlawful action.

The damages section of title VII, 42 U.S.C. 2000e-5(g), authorizes the court to enjoin discriminatory practices and "order such affirmative action as may be appropriate." The Act states that back pay, reinstatement etc. may not be ordered.

VI. CONSENT DECREES.

Current law. Martin v. Wilks, 109 S.Ct. 2180 (1989), held that white employees were not barred from collaterally attacking a consent decree under title VII in which hiring and promotion goals for blacks were set.

Section 108 the CRA of 1991. An employment practice that "implements and is within the scope" of a consent judgment or order resolving a discrimination claim under title VII or the Constitution may not be challenged, with certain exceptions such as collusion or fraud and due process concerns, by a person:

- who had actual notice of the proposed judgment or order "sufficient to apprise such person that such judgment or order might adversely affect the interest and legal rights of such person" and
- "reasonable opportunity" to object or
- if the person's interests were "adequately represented" by another person who had made a similar challenge on the same legal grounds and with a similar factual situation in absence of an intervening change in law or fact.

VII. SENIORITY SYSTEMS.

Current law. Lorance v. AT&T Technologies, Inc., 109 S.Ct. 2261 (1989), held that a claim that a seniority system has a discriminatory impact must be accompanied by proof of discriminatory purpose and the limitations period for filing a claim will run from the date the system was adopted.

Section 112 of the CRA of 1991. An unlawful employment practice is established with respect to a seniority system that has been adopted for an intentionally discriminatory purpose "when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system."

CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976,
42 U.S.C. 1988

Expert fees.

Current law. West Virginia University Hospitals, Inc. v. Casey, 111 S.Ct. 1138(1991). The Court held that the term "attorney's fees" in 42 U.S.C. 1988 does not include expert fees.

Section 113 of the CRA of 1991:

Amends section 1988 to insert "including expert fees" after "attorney's fee."

AMERICANS WITH DISABILITIES ACT

I. DAMAGES.

Current law. The ADA provides that the same remedies are available under the ADA as under title VII, thus precluding compensatory and punitive damages.

Section 102 of the CRA of 1991. The ADA is amended to allow compensatory and punitive damages for intentional discrimination, except where the covered entity demonstrates good faith efforts to provide reasonable accommodation, in consultation with the person with the disability. Punitive damages are not available against public entities.

II. JURY TRIAL.

Section 102 of the CRA of 1991. This subsection incorporates the subsection on damages. It does not refer to the subsection on jury trials. However, the jury trial provision states that "if a complaining party seeks compensatory or punitive damages under this section any party may demand a trial by jury . . . ." Thus, jury trials are allowable in ADA cases.

Squire, Sanders & Dempsey

CIVIL RIGHTS ACT OF 1991 - AN OVERVIEW

By Ronald J. James

The purpose of the new law is to "strengthen and improve federal civil rights laws, to provide for damages in cases of intentional employment discrimination, [and] to clarify provisions regarding disparate impact actions." The bill, which overturns seven recent Supreme Court decisions, makes significant changes in federal civil rights law. Those changes are summarized here, with more specific provisions of the bill listed in the attached outline, and/or Gwendolyn H. Gregory, NSBA's Deputy General Counsel, summary.

In general, the bill makes it easier for plaintiffs to sue employers for alleged discriminatory action under Title VII, Section 1981 of the Civil Rights Act of 1866, the Age Discrimination in Employment Act (ADEA), and the American With Disabilities Act (ADA). The legislation eliminates some and restricts other defenses available to employers, broadens the applicability of some civil rights statutes, extends the limitations period for filing certain claims, limits the ability of third parties to challenge consent decrees, and allows compensatory damages, punitive damages, and jury trials in cases in which they previously were not allowed. The Act also prohibits adjusting scores, using different cutoff scores, or otherwise altering the results of employment-related tests on the basis of race, sex, color, religion, or national origin.

In addition, the Act creates a "Glass Ceiling Commission" to study artificial barriers to the advancement of women and minorities in the workplace. The legislation also amends Title VII to establish a Technical Assistance Training Institute to give employers assistance and training regarding the laws and regulations enforced by the EEOC.

SQUIRE, SANDERS & DEMPSEY

CIVIL RIGHTS ACT OF 1991

Old Law	New Law	Comments
Generally		
1. Compensatory and punitive damages are available under ADEA, but are not available under Title VII. Also, jury trials generally are not allowed under Title VII.	Amends Title VII, ADA, and Rehabilitation Act of 1973 to allow victims of intentional sex, religious, and disability-based discrimination to sue for compensatory and punitive damages. Damages are not available against employers who make good faith efforts to accommodate disabled employees who sue under either ADA or the Rehabilitation Act. Any plaintiff seeking compensatory or punitive damages may demand a jury trial.	Major change. May discourage settlements and increase the size of awards.

SUPREME COURT CASES OVERRULED BY CIVIL RIGHTS ACT OF 1991

Old Law	New Law	Comments
Ward's Cove Packing Co. v. Antonio, 490 U.S. 642, 109 S. Ct. 2115 (1989)		
1. Employers could defend against "disparate impact" claims by showing a business justification for the challenged practices.	Employers must show that a challenged practice is job-related and is consistent with business necessity.	Increases the evidentiary burden for employers in disparate impact cases.
2. To establish disparate impact, plaintiffs must compare the racial composition of the qualified local labor pool to that of the defendant's workforce.	Does not alter the Ward's Cove ruling on this issue.	
Patterson v. McLean Credit Union, 491 U.S. 164, 109 S. Ct. 2363 (1989)		
Protection against discrimination under §1981 of the Civil Rights Act of 1866 extended only to hiring and promotion practices.	Protection under §1981 extends to all forms of racial bias in employment.	Claims for on-the-job harassment, discriminatory firing, and other post-hiring conduct may be made under §1981.
Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775 (1989)		
Employer could avoid liability in "mixed motive" case by demonstrating that the same result would have occurred even absent the discriminatory motive.	All intentional discrimination is unlawful, even if the same result would have occurred without any discriminatory motive. However, courts finding a mixed motive may not award damages or require reinstatement, hiring, or promotion; only declaratory relief and attorneys fees and costs may be awarded.	

Old Law	New Law	Comments
Lorance v. AT&T Technologies, Inc., 490 U.S. 900, 109 S. Ct. 2261 (1989)		
Limitations period for Title VII claims regarding seniority systems begins running when a discriminatory system is adopted.	Limitations period under Title VII begins to run when the individual becomes subject to the system, or when the individual is actually injured, whichever is latest. Change apparently leaves intact the application of Lorance to non-Title VII claims, such as age bias claims under ADEA.	Expands statue of limitations period.
EEOC v. Arabian American Oil Co., _____ U.S. _____, 111 S. Ct. 1227 (1991)		
Federal job discrimination laws apply only to actions taken within the territorial jurisdiction of the United States.	Coverage of Title VII and the ADA is extended to include actions taken by American-owned companies operating abroad. The Act provides an exemption for employers whose compliance with Title VII or ADA would violate the laws of their host countries.	Expands graphic scope of employment litigation claims. Likely to add to cost of litigation.
Martin v. Wilks, 490 U.S. 755, 109 S. Ct. 2180 (1989)		
Non-parties to first case may challenge affirmative action program established in consent decree.	Non-parties to first case who had actual notice of that case may not challenge resulting affirmative action plan, except in very limited circumstances.	
West Virginia University Hospitals v. Casey, _____ U. S. _____, 111 S. Ct. 1138 (1991)		
Fees for non-testimonial services by experts in civil rights litigation may not be shifted to losing party.	Expert fees may be awarded in both Title VII and §1981 actions, as part of award of attorneys fees.	Increases scope of attorneys fees claims.

MOTIONS IN FEDERAL LITIGATION

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"Trial Tactics In School Civil Rights Cases"
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I. MOTION PRACTICE GENERALLY

A. REMEMBER WHO IS READING YOUR MOTION AND BRIEF

Most federal judges are overworked and have too little time. Organize your motion, brief, and any supporting evidence so that the judge immediately can identify what your arguments are. When the motion and brief become complex, as is often the case with summary judgment, make it as easy as possible for the judge to rely on your material when he or she reviews the motion and writes the order. Three suggestions:

(1) For any brief that addresses more than one issue, always use headings within the brief that concisely summarize a particular point or subpoint of your argument. For any brief longer than approximately 8 pages (or for any brief addressing more than two issues or causes of action), use a table of contents repeating the points and subpoints (as you would in an appellate brief). Your headings and table of contents should provide the court with an outline so that the judge can both identify what your arguments are and find the exact page at which you are discussing a particular issue.

(2) If your brief is accompanied by voluminous amounts of evidence, consider binding the evidence in a single volume with tabs separating the various pieces of evidence (together with a table of contents), so that the judge can readily find a particular affidavit or the excerpts from a deposition that you are relying upon.

(3) Never assume that the judge has a working

knowledge of education law. Remember that the judge's briefing attorney likely will be advising the judge on the merits of your motion and brief. Even if you are dealing with an experienced judge, you might have the initial decision on your motion made by an attorney fresh out of law school.

B. ALWAYS CHECK THE LOCAL RULES

The local rules for the federal district courts can vary greatly in motion practice. Variations typically can concern such matters as:

(1) The contents of a motion: Some local rules specify when the motion must have a certificate of conference. Other local rules have specific requirements for specific motions. For example, the local rules of the Northern District of Texas require motions for summary judgment to "list in numerical order (i) the undisputed facts upon which the motion relies and (ii) the issues of law."

(2) Briefs: Rules vary as to when a brief must accompany a motion, the format of the brief, and the maximum page limitation for the brief (as few as 15 pages in some courts).

(3) Time lines for the Response and the Reply: Local rules can govern the time to file a Response to a motion (as few as 10 days) and the time for the movant to file a Reply to the nonmovant's Response (as few as 5 days).

(4) Proposed orders: Some local rules require a proposed order to accompany each motion.

C. TIMELY MAKE THE MOTION

Typically, the timing of motion practice will vary with the demands of each particular case. However, be aware of:

(1) Rule 12 motions: The filing of a Rule 12(b) motion can enlarge the applicable time for the defendant to serve an answer or other responsive pleadings (Rule 12(a)). If the motion is denied or the court postpones disposition of it until trial, the responsive pleading is required to be served within 10 days after service of notice of the court's action. If the defendant exercises the

option afforded him by Rule 12(b) and raises certain defenses and objections by preliminary motion, he is bound by Rules 12(g) and 12(h) which generally contemplate that the defendant assert in a *single* motion all of the Rule 12 defenses and objections that are available to him.

(2) Scheduling orders: The time for making certain motions also will be controlled by the court's Rule 16 scheduling order. Try to get the scheduling order amended if, for example, it establishes the *same* date for the filing of all amendments to pleadings and the filing of all dispositive motions. Otherwise, the defendant may have the plaintiff amending the pleadings and asserting new theories shortly before a motion for summary judgment is due.

(3) Summary judgment: Rule 56(f) is a safe harbor for the nonmovant so that summary judgment is not granted before he has an adequate time for discovery on the factual matters that form the basis for the motion. "Any potential problem with ... premature [summary judgment] motions can be adequately dealt with under Rule 56(f), which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had time to make full discovery." Celotex Corp. v. Cattrett, 106 S.Ct. 2548, 2554-55 (1986).

(4) Motions for judgment as a matter of law (formerly motions for directed verdict and for judgment notwithstanding the verdict): Although Rule 50 now calls them motions for judgment, in actions tried to a jury the defendant must submit a motion for judgment as a matter of law before submission of the case to the jury (i.e., formerly, a motion for directed verdict) in order to renew the motion within 10 days after trial (i.e., formerly, a motion for judgment notwithstanding the verdict). As before, a post-trial motion for judgment as a matter of law can be granted only on grounds advanced in the pre-trial motion. Kutner Buick v. American Motors Corp., 848 F.2d 614 (3rd Cir. 1989).

II. RULE 12 MOTIONS TO DISMISS

Rule 12(b): *"... the following defenses may at the option of the pleader be made by motion:*

(1) lack of jurisdiction over the subject matter,
(2) lack of jurisdiction over the person,
(3) improper venue,
(4) insufficiency of process,
(5) insufficiency of service of process,
(6) failure to state a claim upon which relief can be granted,
(7) failure to join a party under Rule 19."

The 7 defenses contained in Rule 12 may be raised prior to the service of an answer by the defendant since they present preliminary matters that usually should be adjudicated early in the action. Rule 12(b), in combination with the other subsections of Rule 12, promotes the early and simultaneous determination of preliminary defenses. As noted earlier, if the defendant exercises the option afforded him by Rule 12(b) and raises certain defenses and objections by preliminary motion, he is bound by Rules 12(g) and 12(h) which generally require the defendant to raise in a *single* motion all of the Rule 12 defenses and objections that are available to him.

A. 12(b)(1) MOTIONS TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Since most cases against school districts in federal court arise due to federal question jurisdiction, motions to dismiss for lack of subject matter jurisdiction are of limited use.

(1) Rule 12(h)(3) essentially allows the defendant to raise lack of subject matter jurisdiction at any time.

(2) "Unlike a Rule 12(b)(6) motion, a Rule 12(b)(1) motion can attack the substance of the complainant's jurisdictional allegations despite their formal sufficiency, and in doing so rely on affidavits or other evidence properly before the court." St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir. 1989).

(3) "Whether a claim is ripe for adjudication goes to a court's subject matter jurisdiction under the case or controversy clause of the federal Constitution." St. Claire, 880 F.2d at 201 (suit filed before final and definitive decisions had been reached on the controversy

by the governmental bodies).

(4) When based upon the court's federal question jurisdiction, the plaintiff's claim must raise a "substantial" federal question. Claims may be too insubstantial if they are "patently irrational" or they have been foreclosed by prior cases which have settled the specific issue raised. Goldsmith v. Mayor & City Council of Baltimore, 837 F.2d 158, 160-61 (4th Cir. 1988)(city employee's due process claim -- that she was deprived tenure benefits when the city abolished her position even though she was grandfathered into a similar position -- dismissed for lack of subject matter jurisdiction due to precedent giving city unfettered authority to abolish such positions).

(5) "[W]hen a statute provides the basis for both the subject matter jurisdiction of the federal court and plaintiff's substantive claim for relief, a motion to dismiss for lack of subject matter jurisdiction rather than for failure to state a claim is proper only when the allegations of the complaint are frivolous." Black v. Payne, 591 F.2d 83, 86, n.1 (9th Cir. 1979).

(6) If the court lacks subject matter jurisdiction it does not reach the merits of the dispute or issue a judgment on the merits. Goldsmith, 837 F.2d at 162.

B. 12(b)(6) MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM

(1) "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 78 S.Ct. 99 (1957).

(2) All well-pleaded allegations of the complaint are taken as true and viewed in the light most favorable to the plaintiff. Scheuer v. Rhodes, 94 S.Ct. 1683 (1974). Legal conclusions not reasonably supported by the facts alleged are not considered to be well-pleaded allegations. Ivey v. Board of Regents of Alaska Univ., 673 F.2d 266 (9th Cir. 1982).

(3) Exhibits attached to the complaint may be taken into account. Thus, when the governmental employee filed a 55-page complaint to which was attached 250 pages of "true and correct copies" of relevant exhibits, the exhibits provided the factual background showing that the man failed to state either a 14th Amendment procedural due process claim or a 1st Amendment claim (since he had not spoken out as a citizen over matters of public

concern). Caine v. Hardy, ___ F.2d ___ (5th Cir. 1991)(en banc).

(4) A complaint that shows that relief is barred by an affirmative defense may be dismissed for failure to state a claim. For example, a complaint showing that the statute of limitations has run on the claim may be dismissed when the defense appears on the face of the pleading. Bacon v. City of Los Angeles, 843 F.2d 372 (9th Cir. 1988).

(5) The plaintiff usually will be given an opportunity to replead and to cure the complaint if possible. If the complaint is amended (whether it is called an amended complaint or a supplemental complaint), the defendant should reurge the motion in some form in order to preserve the error. Dean v. Ford Motor Credit Co., 885 F.2d 300, 302 (5th Cir. 1989).

(6) Rule 12(b) provides that if matters outside the pleadings are presented along with a 12(b)(6) motion, then the court shall treat it as a motion for summary judgment as provided for under Rule 56.

(7) Rule 12(b)(6) motions are not favored by the court, given that Rule 8 only requires notice pleading. Mahone v. Addicks Utility Co., 836 F.2d 921, 926 (5th Cir. 1988). However, like a 12(c) motion for judgment on the pleadings, they are best used when the defendant has clear precedent that precludes the plaintiff's claim. "While we are chary of Rule 12 dismissals in the face of notice pleadings, given the generous standard for the measure of whether a claim has been stated, there was no set of facts that could have been proved under these pleadings to support a finding that the defendants deprived the [plaintiffs] of any constitutional right." Hardy v. University Interscholastic League, 759 F.2d 1233, 12 35 (5th Cir. 1985)(due process and equal protection challenge to interscholastic league transfer rule dismissed, in light of precedent). In the 5th Circuit, for example, the court specifically has ruled that student hair-length policies of school districts are "per se ... constitutionally valid. Henceforth, district courts need not hold an evidentiary hearing in cases of this nature. Where a complaint merely alleges the constitutional invalidity of a high school hair and grooming code regulation, the district courts are directed to grant an immediate motion to dismiss for failure to state a claim for which relief can be granted." Karr v. Schmidt, 460 F.2d 609, 618 (5th Cir. 1972)(en banc).

III. RULE 56 MOTIONS FOR SUMMARY JUDGMENT

Rule 56(c): "... *The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law*."

In 1986 the Supreme Court revitalized summary judgment practice with decisions in 3 cases: Celotex Corp. v. Cattrett, 106 S.Ct 2548 (1986), Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505 (1986), and Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 106 S.Ct. 1348 (1986). "Before the shift to 'notice pleading' accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial.... But with the advent of 'notice pleading,' the motion to dismiss seldom fulfills this function anymore, and its place has been taken by the motion for summary judgment." Celotex, 106 S.Ct. at 1555.

A. THE MOVANT'S BURDEN

The movant has the burden of showing that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Anderson, 106 S.Ct. at 2514. Summary judgment cannot be granted on grounds not urged in the motion. John Deere Co. v. American National Bank, 809 F.2d 1190, 1191-92 (5th Cir. 87). Since the judge must view the summary judgment evidence "through the prism of the substantive evidentiary burden," Anderson, 106 S.Ct. at 2514, when the nonmovant has the burden of proof on an issue, the movant need not even produce evidence showing the absence of a genuine issue of material fact. The burden on the movant can be discharged by showing -- that is by pointing out to the court -- the absence of evidence to support the nonmovant's case. Celotex, 106 S.Ct. at 2554. "A defendant moving for summary judgment can rely on the absence of evidence to support an essential element of the plaintiff's case." International Ass'n of Machinists and Aerospace Workers v. Intercontinental Mfg. Co., 812 F.2d 219, 222 (5th Cir. 1987).

B. THE NONMOVANT'S BURDEN

When the defendant has moved for summary judgment and shown no genuine issue of material fact, the "plaintiff must present affirmative evidence to defeat a properly supported motion for summary judgment." Anderson, 106

S.Ct. at 2514. The evidence and the inferences are to be viewed in the light most favorable to the nonmovant, Matsushita, 106 S.Ct at 1356-57, but that evidence will be viewed though the prism of the substantive evidentiary burden. Anderson, 106 S.Ct. at 2514. The plaintiff must present affirmative evidence showing that there are "genuine factual issues that can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Id., at 2511. The mere existence of a scintilla of evidence is insufficient; there must be evidence on which a jury could find for the plaintiff. Id., at 2512. Further, the plaintiff "cannot discharge his burden by alleging legal conclusions," Fontenot v. Upjohn Co., 780 F.2d 1190-, 1195-96 (5th Cir. 1986), but must present affirmative evidence even if that evidence is in the possession of the defendant (as long as the plaintiff has had a full opportunity to conduct discovery). Anderson, 106 S.Ct. at 2514.

C. THE COURT'S ROLE

The court's function is to ask whether there is a genuine issue for trial and "whether reasonable jurors could find from a preponderance of the evidence that the plaintiff is entitled to a verdict...." Id., at 2511-12. The court's role, however, is not to make credibility determinations, weigh evidence, or draw inferences in favor of the movant. Id., at 2513. Summary judgment will not lie where there is a genuine issue of material fact which must be resolved by a jury. There is no "genuine issue" where the record taken as a whole could not lead a rational trier of fact to find for the plaintiff. Matsushita, 106 S.Ct at 1355-56. A "material" fact is one "that might affect the outcome of the suit under the governing law". Anderson, 106 S.Ct. at 2510. Disputes over irrelevant or nonmaterial facts will not preclude summary judgment. Williams v. Adams, 836 F.2d 958, 961 (5th Cir. 1988).

"In our view, the plain language of Rule 56(c) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex, 106 S.Ct. at 2552-53.

D. TIMING OF SUMMARY JUDGMENT MOTIONS

As a general rule, the defendant will want to wait until the close of discovery pursuant to the scheduling order before submitting a motion for summary judgment, so that the plaintiff is not given a blueprint of the defendant's theories and arguments. Remember, however, that preliminary Rule 12(b)(6) motions to dismiss for failure to state a claim can be converted into summary judgment motions when matters outside the pleadings are presented. If so, Rule 12(b) provides that the "parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56." The district court has broad discretion in limiting discovery and may properly exercise its discretion to stay discovery until preliminary questions that may dispose of the case are determined. Petrus v. Brown, 833 F.2d 581, 583 (5th Cir. 1987).

A party who has not had an adequate time for discovery to oppose a summary judgment motion need only file a Rule 56(c) nonevidentiary affidavit explaining why it seeks a continuance due to its inability to oppose the motion on the merits. Because such requests ordinarily are treated liberally, the nonmovant only must present specific facts explaining his inability to make a substantive response. Union City Barge Line v. Union Carbide, 823 F.2d 129, 136 (5th Cir. 1987). The nonmovant, however, may not rely on vague assertions that additional discovery will produce needed, but unspecified facts. Id. Nor may the nonmovant avoid confronting the movant's summary judgment proof by seeking discovery on factual matters that would not affect the legal basis for summary judgment. Woods v. Federal Home Loan Bank Board, 826 F.2d 1400, 1414-15 (5th Cir. 1988).

E. SUMMARY JUDGMENT IS DIFFICULT ON QUESTIONS OF MOTIVATION AND INTENT

"[S]ummary judgment is ill-suited for credibility determinations. It is likewise an inadequate procedure for sorting out nebulous questions of motivation. ... 'Often, motivation and intent can only be proved through circumstantial evidence; determinations regarding motivation and intent depend on complicated inferences from the evidence and are therefore particularly within the province of the factfinder. ...[I]t is difficult to determine what evidence might legitimately sway the factfinder and hence be material. Thus, if any facts are in dispute, summary judgment is generally inappropriate.'" Honore v. Douglas, 833 F.2d 565, 570

(5th Cir 1987)(summary judgment denied on issue of whether the university would have taken the same action in the absence of the employee's constitutionally protected speech).

While used cautiously, summary judgment may be granted on questions of motivation and intent when the plaintiff fails to create a fact issue. For example in a case alleging racially discriminatory discipline of students, the court observed that summary judgment is proper when the court "finds no evidence of discriminatory intent other than Plaintiff's unsupported allegations" and the record is devoid of "any evidence indicating that minority children in the [Defendant's] schools were punished more severely than anglo children." Diggles v. Corsicana Independent School District, 529 F.Supp. 169, 173 (N.D.Tex. 1981). Summary judgment may be granted when the plaintiff "fails to raise any issue of fact indicative of racially discriminatory conduct" by the defendants. Acquamina v. Eastern Airlines, Inc., 644 F.2d 506, 508 (5th Cir. 1981); Beard v. Annis, 730 F.2d 741, 743-44 (11th Cir. 1984); Tutton v. Garland Independent School District, 733 F.Supp. 1113 (N.D.Tex. 1990).

F. SUMMARY JUDGMENT GRANTED IN SCHOOL CASES INVOLVING VARIOUS ISSUES OF LAW

(1) First amendment speech: Dorsett v. Board of Trustees for State Colleges and Universities, 940 F.2d 121 (5th Cir. 1991)(de minimis harm alleged and speech not as a citizen on matters of public concern); Nieto v. San Perlita Independent School District, 894 F.2d 174 (5th Cir. 1990)(speech on matter of public concern not protected due to disruption caused by speech); Moore v. Mississippi Valley State Univ., 871 F.2d 545 (5th Cir. 1989)(speech not on matters of public concern); Page v. DeLaune, 837 F.2d 233 (5th Cir. 1988)(speech not on matters of public concern); Martinez v. Cotulla Independent School District, 700 F.Supp. 17 (S.D. Tex 1988)(speech not on matters of public concern).

(2) Constitutional violation not caused by school district policy or custom or by the acts of a policymaker: Jane Doe A. v. Special School District of St. Louis County, 901 F.2d 642 (8th Cir. 1990); Lopez v. Houston Independent School District, 817 F.2d 351 (5th Cir. 1987); Gonzales v. Brown, 768 F.Supp. 581 (S.D.Tex. 1991).

(3) Establishment of religion: Jones v. Clear Creek Independent School District, 930 F.2d 416 (5th Cir 1991)(nonsectarian invocation at graduation ceremony).

(4) Age-discrimination: Fields v. Hallsville Independent School District, 906 F.2d 1017 (5th Cir. 1990); Murray v. Mt. Pleasant Independent School District, 754 F.Supp. 535 (E.D.Tex. 1990).

(5) Due process not required when no deprivation of property or liberty: Thomas v. Smith, 897 F.2d 154 (5th Cir. 1989)(reassignment of teacher to different school and different duties); English v. Hairston, 888 F.2d 1069 (5th Cir. 1989)(property interest not created by state statute providing procedures for nonrenewal of teachers); Davis v. Mann, 882 F.2d 967 (5th Cir. 1989)(no property deprivation despite early termination when full salary paid); Moore v. Mississippi Valley State Univ., 871 F.2d 545 (5th Cir. 1989)(nonrenewal of term contracts); Staheli v. University of Mississippi, 854 F.2d 121 (5th Cir 1988)(property interest cannot be created outside formal tenure system).

(6) Failure to state a claim: Fee v. Herndon, 900 F.2d 804 (5th Cir. 1990)(in 5th Circuit cases arising from Texas, charges of excessive corporal punishment fail to state a due process claim).

G. MOVE FOR PARTIAL SUMMARY JUDGMENT EVEN IF WHOLE CASE MAY NOT BE DISPOSED OF

Rule 56(d) provides for motions for partial summary judgment. When you know that summary judgment cannot be granted in full, move for partial summary judgment as to those issues on which it is likely. Doing so can substantially reduce the settlement value to the plaintiff if you prevail.

IV. MOTIONS BASED ON QUALIFIED IMMUNITY OF INDIVIDUAL DEFENDANTS

When a public official performs a discretionary act, he is entitled to the defense of qualified immunity from suit in his individual capacity if his conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known. Harlow v. Fitzgerald, 102 S.Ct. 2727, 2738 (1987). This broad definition protects all "but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 106 S.Ct. 1092, 1096 (1986). The immunity shields the individual from personal liability for damages.

The individual's immunity is immunity from suit, rather than just a mere defense to liability. Mitchell v. Forsyth, 105 S.Ct. 2806, 2815 (1985). District courts are encouraged to dispose of § 1983 lawsuits in which qualified immunity claims are apparent without resort to cumbersome and expensive discovery. Anderson v. Creighton, 107 S.Ct. 3034, 3042, n.6 (1987); Mitchell, 105 S.Ct. at 2815-16; Harlow, 102 S.Ct. at 2738. Until the court resolves the threshold question of the application of an immunity defense, discovery should not be allowed. Id. "Unless the plaintiff's allegations state a claim of a violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." Mitchell, 105 S.Ct. at 2815. Discovery related to the applicability of qualified immunity is appropriate only when factual issues exist as to the applicability of qualified immunity. Geter v. Fortenberry, 849 F.2d 1550, 1553-54 (5th Cir, 1988).

A. THREE BASIS FOR QUALIFIED IMMUNITY

Where the defense of qualified immunity has been raised, the court should grant the motion in favor of the defendant based upon an any of three separate issues.

(1) The preliminary issue is "whether plaintiff has asserted a violation of a constitutional right at all." "Decision of this purely legal question permits the court to weed out suits" which fail to allege a constitutional claim cognizable under federal precedent. Siegert v. Gilley, 111 S.Ct. 1789, 1793, (1991)(although stigmatizing charges were leveled against the employee, he had voluntarily resigned and the charges were not leveled until several weeks later -- thus, no liberty deprivation).

(2) If a cognizable constitutional claim is present, the second issue is whether the constitutional right was clearly established at the time the official acted. "[T]he applicable law that binds the conduct of the officeholder must be clearly established at the very moment the allegedly actionable conduct was taken." Stem v. Ahearn, 908 F.2d 1, 5 (5th Cir. 1990). To show that a right was clearly established at the time the official acted, "it is not necessary to point to a precedent which is factually on all-fours with the case at bar. It suffices that the teacher be aware of general well-developed legal principles." Jefferson v. Ysleta Independent School District, 817 F.2d 303, 305 (5th Cir. 1987). When analyzing a public official's entitlement to qualified immunity, court decisions subsequent to the period at issue in a particular case can "belie the certainty claimed to have existed during this period" and

can show that the plaintiff's asserted right was not "clearly established". Mathern v. Wilson, 851 F.2d 752, 758 (5th Cir. 1988) The "evolution" of the cases after the period in question, Id., at 759, can "demonstrate[] that, long after the [events in the case before the court], we were struggling with this 'certainty.'" Id., at 758.

(3) Even if a constitutional right was clearly established at the time of the allegedly actionable conduct, the third issue involves an objective examination of the facts facing the defendant and his conduct in response. "[E]ven if a defendant's conduct actually violates a plaintiff's constitutional rights, the defendant is entitled to qualified immunity if the conduct was objectively reasonable." Pfannstiel v. City of Marion, 918 F.2d 1178, 1183 (5th Cir. 1990). "A public official is protected by qualified immunity if a reasonable officer would have believed that his actions met constitutional standards. Significantly, the question is not whether the law is settled, viewed abstractly, but whether, measured by an objective standard, a reasonable officer would know that his action is illegal...." Mathern, 851 F.2d at 756. The law's certainty is viewed "against an objectively reasonable view of the facts facing an official." Id.

B. THE ANALYSIS OF QUALIFIED IMMUNITY FOR SUPERVISORY LIABILITY

For a public official to be held personally liable in his individual capacity due to a failure to supervise the acts of subordinates which cause a constitutional violation, four elements must be shown. The defendant must have:

(1) Received notice of a pattern of unconstitutional acts committed by subordinates;

(2) Demonstrated deliberate indifference to or tacit authorization of the offensive acts;

(3) Failed to take sufficient remedial action; and

(4) Such failure must have proximately caused the injury.

Jane Doe A. v. Special School District of St. Louis County, 901 F.2d 642, 645 (8th Cir. 1990).

The requisite elements are illustrated by the contrast between Jane Doe A. and Stoneking v. Bradford Area School District, 882 F.2d 720 (3rd Cir. 1989), each involving the issue of the qualified immunity of school administrators for a subordinate's sexual abuse of students. The principal in Stoneking was denied qualified immunity because the evidence showed that he "received at least five complaints about sexual assaults of female students by teachers," he actively concealed evidence of the assaults, and he "discouraged and/or intimidated students and parents from pursuing complaints, on one occasion by forcing a student to publicly recant her allegation" that she had been sexually assaulted by a teacher. The superintendent was granted qualified immunity in Stoneking when the evidence showed that his conduct at most amounted to "inaction and insensitivity." All administrators were granted qualified immunity in Jane Doe A. "As to the individual defendants, we agree that the evidence even in the light most favorable to the plaintiffs, would not support a finding that the individual defendants had notice of a pattern of unconstitutional acts by [the subordinate employee] or that they were deliberately indifferent to or tacitly authorized [the subordinate's] alleged physical and sexual abuse of plaintiffs."

V. OPPOSITION TO CLASS CERTIFICATION

The Federal Rules of Civil Procedure delineate certain prerequisites for bringing a class action: joinder of the plaintiff class is impracticable (numerosity), common questions of law and fact, typicality of the claims and defenses, and adequate representation of absent class members. F.R.C.P. 23(a)(1)- (a)(4). Two other requirements have been imposed by the courts: a definable class must exist and the representatives must be members of the class. Wright & Miller §§ 1760, 1761 (1986). The party invoking Rule 23 has the burden of showing that these prerequisites have been met. Wright & Miller § 1759, n.21 (1986). The class description must be specific enough for the court to determine whether a particular individual is a member of the class. Wright & Miller § 1760, n. 9 (1986). The Advisory Committee's Note to the 1966 amendment to Rule 23 indicates that 23(b)(2) is especially suited for charges of racial discrimination. This has led to a relaxing of the 23(a) standards for civil rights cases, despite the lack of textual support in the rule itself. Wright & Miller § 1771.

Additionally, the class action must fit into one of the 23(b) categories. Rule 23(b)(1)(A) allows a class action when the maintenance of separate actions might lead to inconsistent obligations for the defendant. Rule 23(b)(1)(B) facilitates a class action to protect the interests of non-party class members. When the defendant has injured the class as a whole and the class is seeking injunctive or declaratory relief, 23(b)(2) is the appropriate Rule. The catch-all category, Rule 23(b)(3), provides for a class action when common questions of law or fact predominate and a class action method of resolving the dispute is superior to all others.

Civil rights class actions face additional barriers. The first is whether the plaintiff has standing to bring the suit. Wright & Miller § 1776, n. 15. Generally, the plaintiff must show that he/she has been harmed or affected in some way. Id., n.16. Mootness, whether the plaintiff's complaint has been rectified, is a similar problem. Id., n.19. However, the action may be maintained if the class as a whole still has a complaint. Id., n.20. Also, the class representative must have exhausted all administrative remedies before bringing the action, although the rest of the class members need not have. Id., n.24. Finally, in suits brought under the Age Discrimination in Employment Act, it has generally been held that the statutory provision requiring all plaintiffs to file written consent cannot be bypassed by using a class action. Id., n.31.

Rule 23(c)(1) requires the court to determine whether the class action should be maintained as soon as practicable after it has been commenced. The court can make this determination on its own or wait for one of the parties to move for a determination. Wright & Miller § 1785, n. 2. If the court decides that the class action is inappropriate, it may continue the action as a partial class action or allow the plaintiffs to continue the action individually. Wright & Miller § 1785, n.44.

In some instances, the school district must vigorously oppose class certification. For example, for suits seeking to require school districts to elect their school board members from single-member districts under the Voting Rights Act (rather than under at-large election systems), the minority group bringing the suit must show that it is "politically cohesive." In one case, the minority group was composed of both Hispanic and Black plaintiffs who obtained class certification. The district court found evidence of political cohesion among the two minority groups, in part, because of the class action. "[T]he bringing of this lawsuit provides evidence that Blacks and Hispanics have common interests that induce the formation of coalitions." League of United Latin American Citizens v. Midland Independent School District, 648 F.Supp. 596, 606 (W.D.Tex. 1986). If, however, a district intends to settle a case under the Voting Right Act where more than one social/ethnic minority group is involved, it would be to the district's advantage to obtain class certification of all such groups represented by the plaintiffs.

In other instances, opposition to class certification simply will depend upon the nature of the suit. If the school district will be faced with multiple suits or if the relief sought via a class action is primarily declaratory and injunctive (without a threat of substantial class damages), opposition to class certification may not be a viable economic choice. Or, opposition to an across-the-board certification may be appropriate, whereas opposition to an appropriate "sub-class and representatives of it" may not. Wilkins v. University of Houston, 725 F.Supp. 331 (S.D.Tex. 1989), on remand for reconsideration in light of General Telephone of the Southwest v. Falcon, 102 S.Ct. 2364 (1982).

VI. REMOVAL TO FEDERAL COURT

Generally, if an action could have been commenced in federal court, it may be removed to federal court. A defendant may remove a civil action brought in state court to federal court if the federal court would have had original jurisdiction, e.g., to hear a claim by plaintiff arising under the federal Constitution, treaties, or laws. 28 U.C.A. § 1441. Thus, questions arising under the district court's federal question jurisdiction are removable when the plaintiff relies on a federal right as determined from the face of the complaint. Great Northern Railway v. Alexander, 38 S.Ct 237, 239 (1918). The federal question upon which jurisdiction is predicated must appear upon the face of plaintiff's well-pleaded complaint. Gully v. First National Bank, 57 S.Ct. 96, 98 (1936). The plaintiff cannot defeat the defendant's right to a federal forum by artfully casting essentially federal claims as state law claims. Federated Dept. Stores v. Moitie, 101 S.Ct. 2424, 2427, n.2 (1981). As a general matter, the fact that the federal question presented may lack merit does not destroy federal question jurisdiction, Bell v. Hood, 66 S.Ct. 773, 775-76 (1946), unless the federal question is "wholly insubstantial and frivolous." Id., at 776. If the federal court has federal question jurisdiction over the removed complaint, it also will have supplemental jurisdiction over other claims which derive from a common nucleus of operative facts with the federal claim, even as to parties not involved in the claim over which there is federal question jurisdiction. United Mine Workers v. Gibbs, 86 S.Ct 1130, 1138 (1966); 28 U.S.C. 1367(a).

The defendant is required to provide notice of removal, including "a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant. . . ." 28 U.S.C.A. §1446(a). Check the local rules of the court, since some have specific requirements in this area. All defendants must join in the notice. Chicago R.I. & P. Railway Co. v. Martin, 20 S.Ct. 854, 855 (1900). Generally, notice must be filed *within thirty days* of receipt, by service or otherwise, of the initial pleading. 28 U.S.C.A. § 1446(b). However, if removability is not initially apparent, the thirty day period does not begin until receipt of the first paper indicating that the action is removable. 28 U.S.C.A. §1446(b). The time for removal for all parties who are served runs from service on the first party to be served. Getty Oil Corp. v. Insurance Co. of North America, 841 F.2d 1254, 1263 (5th Cir. 1988). The removing defendant must give prompt, written notice to all adverse parties after filing the notice to remove. 28 U.S.C.A. 1446(d). The removing defendant must also give notice to the state court so that no further proceedings shall occur unless and until the case is remanded. 28 U.S.C.A. § 1446(d). Thus, the federally mandated procedures are designed to insure that the parties are not prejudiced by lack of notice.

A number of different factors concerning which is the more favorable forum for the defendant can influence the decision to remove a case. In Texas, for example, the state courts expressly have declined to follow federal summary judgment practice. As a result, summary judgments are much more difficult to obtain in state court than in federal court, and most cases that can be removed typically are removed. Removal might also depend upon the federal judge to whose court the case would be removed. Typically, a federal judge would be more experienced and knowledgeable about § 1983 claims and defenses than would a state judge. Depending on the local judiciary, the federal judges also might be more conservative than the state judges.

In an action removed to federal court, the district court judge has the discretion to remand pendent state claims when all federal claims have been dropped from the action. Carnegie-Mellon University v. Cohill, 108 S.Ct. 614 (1988).

BURDEN OF PROOF IN EMPLOYMENT DISCRIMINATION CASES

Over the past several years, equal employment litigation has become one of the largest components of civil dockets in state and federal courts. Such actions typically arise from claims under various state statutes and under Title VII of the 1964 Civil Rights Act. With the recent enactment of the Civil Rights Act of 1991, which effectively reverses several Supreme Court decisions thought to be favorable to employers, equal employment litigation is likely to become more prevalent.

I. Disparate Treatment

Disparate treatment discrimination occurs when an employee is intentionally treated differently in hiring, discharge, discipline, promotion, transfer, retaliation, demotion and other contexts, because of an illegal criterion, such as race, religion, sex, national origin, age, etc. In disparate treatment cases, courts normally continue to apply the burden-of-proof analysis developed in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). This is true not only under Title VII, but also in cases brought under 42 U.S.C. §1981, the Age Discrimination in Employment Act and the Rehabilitation Act of 1973. The burden-of-proof model that courts normally apply is as follows:

(1) first, the plaintiff makes a "prima facie" case by proving:

- (a) membership in a protected class (race, sex, age, etc.);
- (b) an adverse employment action (discharge, refusal to hire or promote, etc.); and
- (c) non members of protected class were treated differently.

(2) then the employer has a burden to articulate a legitimate non-discriminatory (business) reason for its action.

(3) finally, the plaintiff has an opportunity to demonstrate that the proffered reason was a pretext for discrimination by using

- (a) statistics; or
- (b) admissions; or

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(c) smoking gun statements (sexist remarks, "he's too old and tired," etc.); or

(d) inconsistent statements.

(This formulation for proofs may not be necessary or applicable, however, when a plaintiff presents direct evidence of discrimination which proves intentional discrimination).

The burden of proof always remains on the plaintiff in these "disparate treatment" cases, which are most often termination cases.

A plaintiff may also establish intentional discrimination and/or disparate treatment by demonstrating that he or she was forced to leave employment because intolerable and discriminatory working conditions and that non-protected group employees were not subject to similar conditions. The test of such a "constructive discharge" is whether a reasonable person in plaintiff's position would have felt forced to quit.

In order to minimize the risks of employment discrimination suits based on the allegation of disparate treatment an employer should: (1) adopt a policy which prohibits discrimination based on race, religion, sex, national origin, age, etc.; (2) emphasize to all employees that the policy will be strictly enforced and that deviation may lead to disciplinary action including and up to discharge of the employee; (3) ensure equal application of rules and (4) have human resource professionals review all employment decisions prior to implementation.

II. Disparate Impact

The Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), stated that Title VII prohibits not only overt discrimination, but also employment practices that appear neutral but are discriminatory in operation. Thus, the court found that Title VII prohibits not only intentional discrimination, but also the unintentionally discriminatory consequences of employment practices which "on their face" apply to all employees. Accordingly, under the adverse impact theory, the employer's motivation in establishing the particular employment practice is irrelevant. The plaintiff presents a prima facie case of discrimination by showing that a neutral policy has a harsher or adverse impact on "a 'protected class' (i.e., Hispanics, females, Asians, Blacks, etc.)."

This adverse impact analysis was utilized regarding objective employment criteria such as standard tests, height or weight requirements, and possession of a high school degree. In 1988, the United States Supreme Court held that discretionary or

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subjective selection devices such as interview or performance appraisals were also subject to the adverse impact analysis. Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988).

In 1989, the Supreme Court issued its decision in Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989), in which it sharply restricted a plaintiff's ability to prevail under an adverse impact theory. The Court held that a mere statistical disparity in an employer's work force, without more, is insufficient to establish a prima facie case of adverse impact discrimination. In addition, the Court made it easier for the employer to rebut a prima facie case of adverse impact. Under Wards Cove, an employer was not required to demonstrate that a policy or practice was essential or indispensable to its business operations: rather, the employer needed only to produce evidence of a business justification for its practice.

Pursuant to Wards Cove, the plaintiff's burden of proof is as follows:

1. Plaintiff must demonstrate as a part of his or her prima facie case it is the application of a specific or particular employment practice that has created the disparate impact under attack.
2. Defendant employer must carry the burden of producing evidence of a business justification for any employment practice shown to have a disparate impact.
3. Plaintiff may still prevail if he or she persuades the fact finder that other practices, without a similar disparate impact, would also serve the employer's legitimate interests, including factors such as costs.

On November 21, 1991, the Civil Rights Act of 1991 took effect and effectively reverses the Supreme Court decision in Wards Cove, among other decisions rendered in 1989. Section 105 of the Act amends Section 703 of Title VII to provide that an unlawful employment practice based upon disparate impact is established if:

1. Plaintiff demonstrates that an employer uses a particular employment practice that causes a disparate impact.

   a. Plaintiff may demonstrate that each challenged employment practice causes a disparate impact; or

   b. Plaintiff may demonstrate that the elements of the employer's decision-making process are not capable of separation for analysis, in which case the decision-making process as a whole may be analyzed as one employment practice.

2. The employer fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.

   a. If the employer demonstrates that the complained of employment practice does not cause the disparate impact, the employer is not required to demonstrate that the practice is required by business necessity.

3. Plaintiff may also establish an unlawful employment practice based upon disparate impact if he demonstrates in accordance with the law prior to Wards Cove that alternative employment practices, without the undesirable disparate impact, would equally serve the employer's legitimate interests and the employer refuses to adopt such practices.

III. Mixed Motive Case

In Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), the United States Supreme Court considered a case which dealt with "mixed motives" -- where an employer's employment decision was partially based on legitimate business considerations, and partially based on gender, an impermissible criterion. This decision holds that the burden-shifting cases provided for in McDonnell Douglas Corp. v. Green and Texas Department of Community Affairs v. Burdine, is not applicable in "mixed motive" cases.

In Price Waterhouse, a female senior manager alleged that she was denied a promotion to partner because she was a woman. Although the company received complaints regarding her abrupt and rude behavior to support staff, remarks were also made about her lack of femininity. The Court found that while legitimate reasons existed for denying the manager promotion, such as poor interpersonal skills, the other remarks were evidence of sexual stereotyping which may have impermissibly influenced the manager's promotion opportunities. According to the plurality opinion, the Court held that a plaintiff must show by a preponderance of the evidence that illegitimate motives played a "motivating part" in the employment decision. Once the plaintiff has established this, the burden of persuasion is shifted to the employer to prove by a preponderance of the evidence that it would have made the same decision in the absence of the illegitimate considerations.

Section 107 of the Civil Rights Act of 1991 amends Section 793 of Title VII for the purpose of overruling one aspect of the Supreme Court's decision in Price Waterhouse. Section 107 provides that an unlawful employment practice is established when plaintiff demonstrates that race, color, religion, sex or national origin was a motivating factor for any employment practice even though other factors also motivated the practice.

If defendant employer demonstrates that it would have taken the same action in the absence of the impermissible motivating factor:

> The court may still grant declaratory and injunctive relief and award costs and attorneys fees directly attributable to plaintiff's claim, but
>
> The court may not award damages or issue an order requiring any admission, reinstatement, hiring, promotion or payment to plaintiff.

Finally, Section 105 of the Civil Rights Act of 1991 amends Section 703 of Title VII to provide that a demonstration that an employment practice is required by business necessity may not be used as a defense of a claim of intentional discrimination.

IV. Scope of 42 U.S.C. §1981

Prior to amendment, 42 U.S.C. §1981 provided:

> All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the scrutiny of persons

> and property as is enjoyed by white citizens, and shall be subject to light punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

For years, Section 1981's guarantee that all persons have the right to "make and enforce contracts" had been interpreted by federal courts to prohibit race discrimination in all aspects of the employment relationship. In Patterson v. McLean Credit Union, 491 U.S. 164 (1989), the Court considered a claim by plaintiff that, because of her race, she was subjected to harassment on the job and was not promoted to a higher position. The Court narrowly limited Section 1981's coverage, ruling that the statute does not apply to (1) harassment (discrimination), (2) discrimination in terms or conditions of employment, or (3) termination. Rather, the Court found that the only discrimination prohibited by Section 1981 was race discrimination in the making of employment contracts -- i.e., a refusal to hire or to enter into subsequent employment contracts such as contracts for promotion, was prohibited, as was race discrimination in the enforcement of contracts.

Section 101 of the Civil Rights Act of 1991 amends 42 U.S.C. §1981 for the purpose of overruling one aspect of the Supreme Court's decision in Patterson.

1. Section 101(2)(b) of the Civil Rights Act of 1991 provides that the term "make and enforce contracts" is used in 42 U.S.C. §1981 includes "the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of contractual employment."

2. Section 101(2)(c) also codifies Runyon v. McCrary, 427 U.S. 160 (1976) by providing that the rights protected by 42 U.S.C. §1981 are protected against impairment by non-governmental discrimination and impairment under color of state law.

Conclusion

Although employers should be familiar with the specifics of Title VII and the Civil Rights Act of 1991 and court decisions which interpret these statutory provisions, the key to maximizing equal employment opportunity and thus minimizing employment discrimination litigation is to:

(1) treat comparably qualified employees similarly;

(2) apply rules of conduct and behavior equally; and

(3) treat employees with respect, decency and with sensitivity to equal employment opportunity factors. In other words practice the Golden Rule.

Henry W. Saad
Robert E. Carr

REC/SECY/99999/BR9/lmw

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FOREWORD

Few spectacles, it might be said, can be more absurd and incongruous than that of a jury composed of twelve persons who, without any previous scientific knowledge or training, are suddenly called upon to adjudicate controversies in which the most eminent scientific men flatly contradict each other's assertions.

-- Stevens, On Trial by Jury and the Evidence of Experts

Trial judges must be sensitive to the qualifications of persons claiming to be expert. Because the universe of experts is defined only by the virtually infinite variety of fact questions in the trial courts, the signals of competence cannot be catalogued. . . . First, many experts are members of the academic community who supplement their teaching salaries with consulting work. We know from our judicial experience that many such able persons present studies and express opinions that they might not be willing to express in an article submitted to a refereed journal of their discipline or in other contexts subject to peer review. We think that is one important signal, along with many others, that ought to be considered in deciding whether to accept expert testimony. Second, the professional expert is now commonplace. That a person spends substantially all of his time consulting with attorneys and testifying is not a disqualification. But experts whose opinions are available to the highest bidder have no place testifying in a court of law, before a jury, and with the imprimatur of the trial judge's decision that he is an "expert."

In sum, we adhere to the deferential standard for review of decisions regarding the admission of testimony by experts. Nevertheless, we take this occasion to caution that the standard leaves appellate judges with a considerable task. We will turn to that task with a sharp eye, particularly in those instances, hopefully few, where the record makes it evident that the decision to receive expert testimony was simply tossed off to the jury under a "let it all in" philosophy. Our message to our able trial colleagues: it is time to take hold of expert testimony in federal trials. . . .

-- In re: Air Crash Disaster at New Orleans, La.,
795 F.2d 1230, 1334 (5th Cir. 1986)

In these times when it is impossible to know everything, it becomes necessary for success in any vocation to know something of everything and everything of something, the expert is more and more called upon as a witness in both civil and criminal cases. In these days of specialists. their services are often needed to aid the jury in their investigation of questions of fact relating to subjects with which the ordinary man is not acquainted.

-- Francis Wellman, The Art of Cross Examination

I. INTRODUCTION

A. Use of experts is as varied as the theories of the civil rights causes of action involved in each case.

B. The purpose of this outline is to provide a practical guide for understanding the selection and trial use of experts as well as to comment on the special discovery and trial issues of dealing with the adversary's expert.

C. An expert is no substitute for analyzing your case, developing an effective theme with simple language, simple analogies and simple imagery plus an incisive opening statement, vigorous witness examination and a "last word" closing argument.

II. REVIEW OF THE RELEVANT RULES

A. Federal Rules of Evidence (hereinafter F.R.E.)

1. F.R.E. 701, entitled "Opinion Testimony by Lay Witnesses," expressly provides that:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

2. F.R.E. 702: Expert may testify where:

> (a) scientific, technical, or specialized knowledge,
>
> (b) would assist trier of fact to determine fact in issue,
>
> (c) and witness qualified by knowledge, skill, training, experience or education.

3. F.R.E. 703: Expert opinion may be based on type of information reasonably relied on by experts in field, including hearsay and inadmissible evidence.

4. F.R.E. 704: Opinion may embrace ultimate issue.

5. **F.R.E. 401 and 402:** Relevant evidence is generally admissible; irrelevant evidence is inadmissible.

6. **F.R.E. 403:** Misleading, confusing, *unduly* prejudicial evidence excluded, even if relevant.

7. **F.R.E. 803(18):** Learned treatises: may be relied on during direct examination, called to attention on cross; are read into evidence; are not exhibits.

8. **F.R.E. 1006:** Summaries of voluminous records may be entered into evidence in lieu of complete records.

B. **Federal Rule of Civil Procedure 26(b)(4) (See Appendix I):** Permissible expert discovery; consulting versus testifying experts; payment.

C. Recent Developments

1. The new subsection (c) of the Attorneys' Fees Awards Act (42 U.S.C. 1988) provides that expert fees may be included as part of the attorneys' fees awarded under Section 1981 of the 1866 Civil Rights Act. Title VII is also amended to include expert fees in the section providing for attorneys' fees (42 U.S.C. 2003-5(k), § 113 of the Civil Rights Act of 1991.) (Reversing *West Virginia University Hosp., Inc. v. Casey, __ U.S. __, 113 L.Ed.2d, 68, 111 S. Ct. 1138, 55 FEP 353* (1991)).

2. Executive Order 12778 implemented the reforms to civil litigation involving the U.S. Government. Federal agencies are required to implement discovery and expert witness reforms and to adopt the Fairness Rule with respect to costs and fees incurred by the prevailing party in a lawsuit. Agencies would also be required to attempt to settle disputes prior to litigation and to employ settlement and Alternative Dispute Resolution techniques in order to avoid prolonged litigation. Specifically, it requires that expert testimony would be used only if it is based on "widely accepted theories," and contingency fees will not be used to compensate expert witnesses.

III. EXPERT WITNESSES

A. What is an expert?

Generally -- Someone who is openly permitted to offer opinion testimony based on his or her possession of more specialized knowledge on a particular subject than a lay person.

B. Test of Admissibility:

There is no more certain test for determining whether experts may be used than the common sense inquiry *whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.* Advisory Committee on Proposed Rule 702, Federal Rules of Evidence, citing Ladd, *Expert Testimony*, 5 Vand. L. Rev. 414, 418 (1952) (emphasis added).

C. Broad application of the term "expert":

1. Expert opinion evidence is not restricted to the testimony of the one person best qualified to give the opinion or even the sum of the few persons best qualified. There is no fixed standard as to the amount or kind of knowledge required to classify a witness as an expert; generally all that is required is that the expert has skill and knowledge superior to that of the general populace. 31A Am. Jur. 2d, *Expert and Opinion Evidence*, § 59 (1989).

2. An "expert" is one who has acquired certain habits of judgment based on experience or special observation. *State v. Arnold*, 341 P.2d 1089, 1099, 218 Or. 43 (1959), *modified on other grounds*, 343 P.2d 1113, 218 Or. 43 (1959).

3. "Expert" is one qualified by study, training, or experience in a particular subject or field of endeavor which gives him special knowledge and permits him to form definite opinions of his own on matters persons lacking such knowledge or training cannot correctly decide. *Midtown Properties, Inc. v. George F. Richardson, Inc.*, 228 S.E.2d 303, 307, 139 Ga.App. 182 (1976); *Dougherty v. Boyken*, 155 N.W.2d 488, 490 (Iowa 1968).

4. "Expert" is generally defined as someone possessing certain skill or knowledge which is beyond competence of average laymen or jurors. Bean v. Diamond Alkali Co., 454 P.2d 69, 71, 93 Idaho 32 (1969).

5. "Expert" has been defined as a person who is qualified, either by actual experience or by careful study, and may be competent to testify as expert in proper circumstances although his knowledge was acquired through practical experience rather than scientific study, training and research. People v. Overlander, 248 N.E.2d 805, 807, 109 Ill. App.2d 469 (1969).

6. "Expert" is a person who is skilled or highly trained and informed in some special field. Perk v. Board of Revision, 272 N.E.2d 188, 200, 29 Ohio Misc. 1 (1971), aff'd in part, rev'd in part on other grounds, 275 N.E.2d 642, 28 Ohio App. 2d 182 (1971).

7. "Expert" is a person who can express an opinion based on skill, experience or knowledge in a particular field. State v. Jessen, 633 P.2d 410, 416, 130 Ariz. 1 (1981).

D. Kinds - Possibilities - Civil Rights Cases:

1. Substantive Experts:

Accountants
Actuaries
Census Bureau Personnel
Demographers
Educators
Gerontologists
Head Hunters
Human Factors Engineers
Industrial Engineers
Industrial Psychologists
Job Analysts
Job Evaluators
Kinesiologists
Labor Economists
Lawyers
Occupational (Industrial) Physicians
Personnel Placement Agency Personnel
Physicians (various specialties)
Physical Therapists
Polygraph Examiners (where permitted)
Psychometricians
Rehabilitative Medicine Experts
Relocation Specialists
Safety Experts
State Employment Service Personnel
Statisticians
Training
Transportation
Wage & Salary Experts

2. Other:

Accident Reconstruction
Architects
Computer Technologists
Construction Trades
Contractors
Fire Protection
Insurance
Law Enforcement
Pharmacists
Real Estate Brokers & Appraisers
Surveyors
Title (land) Experts
Urban Planners

3. Experts to Assess Damages in Children's Cases:

Audiologist
Clinical Geneticist
Clinical Social Worker
Developmental Pediatrician
Economist
Gastroenterologist, Pediatric
Neurologist, Pediatric
Nurse, Pediatric
Nutritionist
Occupational Therapist
Ophthalmologist, Pediatric or Neuro-Ophthalmologist
Orthopedist, Pediatric
Orthodontist
Psychiatrist, Child
Psychiatrist, Pediatric
Physical Therapist
Psychologist, Rehabilitation
Pulmonologist, Pediatric
Rehabilitation Counselor
Rehabilitation Engineer
Special Education Teacher
Speech & Language Clinician

4. Lay Experts:

Often overlooked -- individuals, fact witnesses who are not qualified as expert witnesses but who may render testimony in the form similar to experts. See F.R.E. 701. Nothing in the Federal Rules prevents an interested fact witness (teacher, school administrator) from also qualifying as an expert.

5. If experts are used, don't overlook the possibility of using the expert to testify as to any factual matters of which that expert can testify from personal knowledge:

> Most of the literature assumes that experts testify only in the form of opinion. The assumption is logically unfounded. . . . Since much of the criticism of expert testimony has centered upon the hypothetical question, it seems wise to recognize that opinions are not indispensable and to encourage the use of expert testimony in non-opinion form when counsel believes the trier can itself draw the requisite inference. (Emphasis added).

Notes of Advisory Committee on Proposed Rules, Federal Rules of Evidence, Rule 702.

E. Pros and Cons of Use of Experts:

1. Why/When Do You Need Them?

   a. when they can communicate better than other available witnesses;

   b. when no lay witness would be allowed or able to effectively relate opinions and withstand cross-examination;

   c. to build a record;

   d. when issues are esoteric;

   e. to counter the other side;

   f. to help you cross-examine the other side.

2. Why Not Use Them?

   a. Judges and juries are skeptical/hostile;

   b. no one available who communicates in simple language;

   c. expense;

   d. adequate lay witnesses available;

   e. party who has the most experts does not necessarily win;

   f. use may be unnecessary or even harmful.

F. Myriad of Sources of Expert Witnesses:

1. Client Personnel;

2. Local, regional and national professional, trade or bar associations (DRI, NSBA);

3. Computerized legal research by type of case or name of expert:

4. Government officials;

5. Journal, article and literature searches;
6. Judges;
7. Libraries/Librarians;
8. Recommendations of other counsel or experts in same field;
9. Universities;
10. Expert Referral Services.

G. Matching the Expert With the Case -- Once it has been determined that expert testimony is needed, and in order to properly match an expert with specific needs of your case, selection should be done in two stages:

1. Identify the specific area in which expertise is needed; and
2. Locate experts with qualifications in that area.

H. Selecting the Expert (Looking for Mr. Goodbar - the well-respected expert with whom the jury can most easily identify) Characteristics may include:

1. national reputation and credentials and/or "local" connections;
2. ability to explain concepts in an interesting, dynamic fashion;
3. fair, honest, forthright demeanor, not a "hired gun";
4. work characteristics - timely, productive, reasonable, responsive;
5. how well you and your client relate to the expert;
6. his/her rates.

I. Working with the Expert

1. Initial Communications

Rule out conflicts, describe the type of case and the nature of the work to be done. Avoid slanting the facts, overstating the case, or misleading the expert. Obtain the expert's resume and key writings, depositions.

Establish: What exactly the expert is expected to do; questions the expert will be asked to examine (state in neutral fashion); the information needed by the expert, the sources, and how that information will be provided; the methodology to be used; the manner of payment, fees and timetables.

2. Clear Expectations are Critical

Do you want an initial, tentative, oral opinion? A final written report? The preparation of trial exhibits? The expert's help in deposition or cross-examination of opposing experts? Expert available for rebuttal at trial?

Establish communication ground rules: e.g., if you are using a testifying expert (not consultant), you may not want any written communications at all, only personal meetings or phone calls; avoid speculations and theories; emphasize care regarding notes, drafts and trial balloons.

3. Maintain Good Working Relationship

Be responsive; return phone calls; keep the expert informed on pretrial and trial dates; provide needed information; educate the expert clearly, carefully, accurately and thoroughly on the applicable legal standards (e.g., Section 1983, implied contract, compensable emotional distress, the meaning of "to a reasonable degree of medical probability"); pay your bills on time.

IV. SPECIAL PROBLEMS IN DEPOSITION/DISCOVERY OF EXPERT WITNESSES (THEIRS AND OURS)

A. Expert Discovery

1. What the rules allow -- Federal Rules governing pre-trial discovery of experts are generally more liberal than the prevalent state court approach. F.R.C.P. 26(b)(4) is the governing rule (Appendix I).

2. Expert interrogatories must be used under the federal rules; they are also part of good state court practice. Track the rules precisely - then consider asking early and for more.

3. In short, by interrogatory, you may learn the identity of any expert whom your adversary expects to call as an expert trial witness, the substance of the facts and opinions as to which the expert is expected to testify, and a summary of the grounds for each of his/her opinions. Keep in mind that it is difficult to get an adversary early in litigation to admit that expert trial witness has been identified. Accordingly, the right by interrogatory to learn expert's identity and the substance of expert's testimony should be highlighted as continuing.

B. Expert Depositions -- Do you want one?

1. Important to think through why you need one and what you propose to do with it once you get it. Expert witnesses should not be routinely examined just because they are there, and/or because the applicable rules or a court permits examination.

2. Your opponent's expert witness is not ordinarily one with whom counsel is "stuck." An expert witness who testifies poorly at deposition, or whose flaws in methodology are exposed can be replaced, and/or improve his/her testimony or cure defects. As experts are not ordinary fact witnesses, they are not necessarily confined to the facts as they represent them at the time of the deposition.

C. Expert Depositions

1. Can you get one? Compare your state versus Federal Rule 26(b)(4). Remember who pays, unless otherwise arranged. Rule 26(e). Again consider timing - at what stage of the case do you note the opposing expert's deposition; who goes first?

2. When may you not be able to get one? An expert retained or specially employed only for consultation purposes to assist in preparation for trial, but not "expected" to be called as a witness, may be deposed only upon a showing of "exceptional circumstances" as defined, or if what is involved is the seeking of the report of a physician who conducted an examination by order under Rule 35.

3. Notice/production -- By letter with your Notice, request expert to produce and/or use a subpoena duces tecum that requests the expert to provide, prior to his deposition, or to bring the following materials:

    a. Curriculum vitae, or summary of expert's professional qualifications.

    b. Copies of all scientific and technical publications authored by expert.

    c. All time records, diaries, and bills prepared and rendered in connection with expert's investigation and evaluation of the issues involved in the lawsuit.

    d. Expert's complete file in connection with the evaluation of the issues involved in the lawsuit, including but not limited to:

        (1) All documents furnished to expert by anyone;

        (2) All documents obtained or created by expert;

        (3) All documents expert reviewed, referred to, or relied upon in arriving at any of his/her opinions or conclusions concerning the issues involved in the lawsuit, including but not limited to all scientific and technical articles, publications, codes, standards, and other literature;

        (4) All models, illustrations, photographs, computer programs, or other exhibits or documents of any kind which he/she intends or contemplates using to explain, illustrate, or support his/her testimony at trial.

4. Preparation -- Consider having your own expert help you prepare for the deposition of the opposing expert and be sure to explore:

    a. what the expert has been asked to do;

    b. what information has been given, withheld, relied on, rejected;

   c. what methodology has been used;

   d. whether any preliminary studies have been done;

   e. every single *assumption* made by the expert; and

   f. the expert's competence, qualifications, number of times testified, and manner of testifying.

D. Protecting Your Expert--Be Careful What Expert Sees

1. Federal and State rules governing pretrial discovery seem to honor the attorney-client privilege and work-product doctrine, but F.R.E. 612 contains a trap. The rule provides only that, apart from Jencks Act materials, when a trial witness uses a writing to refresh his/her memory for the purpose of testifying, either while he testifies or, in the court's discretion, before testifying, the adverse party is entitled to examine the writing that had been shown to the witness. That should present no problem, since factual materials shown to expert are not ordinarily used to refresh his/her memory, but rather to provide a factual basis for his/her opinion. *But see*, *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613, 617 (S.D.N.Y. 1977), (holding that fact notebooks shown to an expert witness before trial -- and presumably work product of counsel -- would in future be required to be disclosed under F.R.E. 612).

2. When written materials are used in preparing an expert for his/her deposition and that fact is disclosed at the deposition or trial, one risks having to disclose those materials. Therefore, provide only those written materials to an expert which one is prepared to turn over to the other side.

3. If you have created fact memoranda, or created or collected other material which ordinarily would be immune from discovery, do not jeopardize the protected status of such materials by unnecessarily showing them to your expert prior to his/her deposition.

4. Do use your deposition of the other party's expert to determine what materials he/she has seen, thereby providing the predicate for a Rule 612 motion.

V. THE EXPERT AT TRIAL

With erudite profundity,
And subtle cogitabundity,
The medical expert testifies in court;
Explains with ponderosity
And keen profound verbosity
The intricate nature of plaintiff's tort.

Discoursing on pathology,
Anatomy, biology,
Opines the patient's orbit suffered thus:
Contusion of integuments,
With ecchymotic embellishments,
And bloody extravasation forming pus.

A state of tumorosity
Producing lachrymosity,
Abrasion of the cuticle severe,
All diagnosed externally,
Although he feared, internally,
Sclerotic inflammation might appear.

The jury sits confused, amazed,
By all this pleonasm dazed,
Unable to conceive a single word.
All awed, they think with bated breaths
The plaintiff died a thousand deaths --
What agony and pain he had endured?

But then the counsel for defense,
Devoid of garrulous eloquence,
Asked, "Isn't it true that all you testified
Means merely from a punch or two
The plaintiff's eye was black and blue?
"Yes, that's correct," the doctor meekly sighed.

Judge Albert A. Woldman, quoted in Stevenson, Cross Examination Strategy (New Jersey Executive Reports Corp. 1978) p. 1304

A. Preparing Your Expert for Direct Examination

1. Thorough preparation is essential--including not only the key areas, but the actual questions (themes) to be asked on direct, and formulation of responses by the expert.

2. Use actual trial exhibits. Will you use a calculator, blackboard or an overhead projector? How should your expert handle demonstrative aids and exhibits?

3. Have your expert practice his/her testimony in the teaching mode. (e.g. do it before your secretary and ask him/her if they understood the presentation).

B. Direct Testimony

1. When qualifying your expert, briefly emphasize the highlights of his/her expertise.

2. Bring out how he/she is being paid before your opponent does.

3. Establish the connection: Doctor, did you review the plaintiff's employment history?

4. Establish information he/she used in formulating his/her opinion.

    a. What asked to do (mission)?

    b. How usually done?

    c. Information source(s)?

    d. Model(s) used?

5. Ask for opinions and their bases -- do early and often.

C. Cross-Examination--Thorough preparation is the key

1. Initial Questions:

    a. Do I really need to cross-examine; can I afford the risk of cross-examining this expert?

    b. Are my questions merely superficial attacks as to the expert opinion or do they go to key points?

    c. Is the expert so well known, highly regarded and sincere you cannot realistically hope to mitigate effect of testimony?

2. Non-Credible Expert Witness -- full speed ahead but with a purpose -- To create impression that cross was successful by discrediting expertise:

    a. Based on lack of qualification, experience, bias and/or his/her opinions expressed on direct;

b. Securing favorable admission and/or modification to his/her conclusions on direct, and/or;

c. Establish collateral support.

3. Safe Cross-Examination Questions:

   a. Who called expert as witness?

   b. Who did the expert consult about the case?

   c. Did the expert discuss testimony with opposing party's lawyer? How often?

   d. Did the expert witness attend any meetings with plaintiff's witnesses present? When? Where?

   e. Never pass up chance to show that expert is a professional full-time witness: Testified often? Always for plaintiff? Number of times testified for adverse party before?

4. Standard for measuring effective Cross-Examination:

> The test of good cross-examination is what it accomplishes in the case--not how it impresses bystanders. One of the problems with concentrating on technique is that it can lead the unsuspecting lawyer away from content--and your theory of the case. A beautiful incision in the wrong place is not good surgery. Cross-examination that does not advance the objective of the case is not good cross-examination.

McElhaney, Trial Notebook (2d ed. 1987), p. 265.

VI. SELECTED EXAMPLES -- USE OF EXPERTS

A. The New or Novel Non-Expert Experts

1. You are only limited by your imagination.

2. Examples of Novel Use:

   a. For the defendant, a "headhunter" personnel director for schools may testify that looking for work is a full-time job: that an "average" mid-level executive can find new employment within months, with full effort; that even being fired does not prevent re-employment.

b. A document examiner was qualified to testify regarding the probability of whether defendant had endorsed certain documents. U.S. v. Hardrich, 707 F.2d 992 (8th Cir. 1983).

c. It is universally recognized that expert testimony from qualified individuals regarding the issue of intoxication is admissible. That expertise may come from a myriad of qualified individuals: those who had the opportunity to observe the conduct of an intoxicated individual, toxicologists, pharmacologists, laboratory personnel who conduct blood alcohol testing, or specialists in areas such as psychiatry, forensic medicine, neurology, or bartenders.

d. Undercover officer who had been in close association with narcotics officers was qualified to testify as to terminology used in drug lore. U.S. v. Phillips, 593 F.2d 553 (4th Cir. 1978).

e. D.E.A. agent qualified as expert properly allowed to testify concerning the use of drug words and drug prices. U.S. v. Dawson, 556 F. Supp. 418 (E.D. Pa. 1982).

f. For the plaintiff, an "employee relations expert" may testify that an employee's discharge was "unfair;" that the employer should have warned and counseled the employee; that the employer breached a covenant of good faith and fair dealing; and that the employee would not be able to find other employment. Crenshaw v. Bozeman Deaconess Hosp., 693 P.2d 487 (Mont. 1984).

B. Experts To Assess Damages In Children's Case

1. A difficult, relatively new area, so the number of alleged experts abound and the mistakes being made by plaintiffs and defendants are legion.

2. In approaching, investigating, hiring, deposing and cross-examining experts, it is important to keep some of the following pitfalls in mind:

a. Were proper procedures used, i.e. was a thorough clinical history secured either through the child and/or some reliable third-party parent, teacher, school psychologist, childhood pediatrician?

b. Is the the expert adequately qualified and equipped? Did he/she consider alternative theories for the plaintiff's complaints, i.e. medication effects, pre-existing physical and/or psychological problems, family problems, stress, normal developmental issues, undue and improper influence, (parent, grandparent, aunt, uncle) on child's complaints and what motivation is there for recovery?

c. Is the expert qualified only for a specialized purpose but engaged in activity well beyond his/her range of expertise, e.g. has no experience in training, has no experience in testing or training children or has served as both a treating and evaluating physician?

d. Inadequate efforts and/or failure to secure or review medical records or school psychological testing records, as well as other reliable, tangible sources of information;

e. Insufficient procedures to secure/render the findings, e.g. the battery of tests not appropriate for the alleged injury or age level of child.

3. Some of the records the expert needs to do the job right:

a. To make a proper assessment, counsel should secure a signed release from, depending on the jurisdiction, parents and/or guardian and/or plaintiff's counsel before records involving a minor are released. The type of documents requested should include but not be limited to psychological and achievement testing records;

b. Psychological treatment, notes, evaluations and billing statements;

c. Previous litigation involving the child, parent and/or guardian and transcripts of depositions and trials, plus medical and psychological records;

d. All medical records including birth and relevant history of mother, hospital records at child's birth and especially parents' medical records should be considered;

   e. Records, if appropriate, including divorce, custody, separation records and/or reports of child abuse or any court order, treatments or therapy;

   f. All school records including nursery school, grades, transcripts, additional reports of achievement, intellectual, psychological reports and health records.

4. With regard to the injury, does the diagnosis fit in the well-defined category of DSM III-R and/or are the complaints largely associated with normal childhood development;

5. Causation: Was it accounted for, addressed; include an examination of pre-existing factors and effects of accident.

C. Use of Economist/Statistician

1. Usually called as a damages expert but statisticians/economists are sometimes used to make out a disparate impact case, hiring, or disparate pay in an equal pay case.

2. As these individuals are usually making calculations based on numbers, a frontal attack is generally not productive unless the experts have made errors of addition. However, the experts may be attacked in any number of ways:

   a. Erroneous economic considerations;

   b. Emphasize that the expert's assumptions, tables, checks are not dealing with a real person but with Mr./Mrs. Average;

   c. Choosing assumptions (biased by only focusing on a number of possible results);

   d. Technical errors (e.g. fair to use the appropriate work life table for smokers vs. non-smokers);

   e. Failure to compare the numbers with reality (e.g. not testing whether the actual evidence or experience conforms to the hypothesis);

f. Showing that other equally or better qualified experts disagree with the opinion voiced by the expert through the use of learned treatise which contradicts the witness' prior testimony;

g. Attacking the validity of the opinion resulting from lack of any personal and/or limited knowledge which forms the basis of his/her opinion in that he/she had limited or no opportunity to observe or to study the facts forming the basis of his/her opinion.

3. It is helpful if you have decided to use your own expert to have him/her present at trial to listen, and, more importantly, to help you. Therefore, be sure to get him/her excused from the sequestration rule;

4. Do not necessarily let plaintiff determine the nature of the experts' battle. For example, economists are a favorite of the plaintiff's bar. However, in the case of a future income loss where the question is not if there was a loss but how much, just about any economist can run the numbers based on past economic trends and prognosticate the future. In substance it may be better to concede there is an economic loss but bring in a heavy hitter, e.g. an annuity expert, to evaluate how far out the stream of income (future loss) will be.

D. Experts in Sexual Harassment Cases--There are an increasing number of Title VII lawsuits based on claims of sexual harassment and attendant state laws claims of wrongful discharge, invasion of privacy, assault and battery, intentional infliction of emotional distress, etc. There has been a growth in cases alleging emotional harm from non-impact (psychological injuries) occurring in the workplace and school based on such claims.

1. Any defense damages and/or deposition/cross-examination of plaintiff's experts must consider an exploration of the following areas of possible attack:

a. Insufficient psychological evidence of pre-existing clinical and/or personality disorders;

b. Symptoms produced by a non-related physical illness;

c. Temporary effects of medication;

d. Diagnosis of an adjustment and/or a post-traumatic stress disorder;

e. Malingering;

f. Non-related life stressors.

2. Deposing plaintiff's psychologist, psychiatrist or psychiatric social worker in order to ascertain the multitude of options for explaining plaintiff's claim, e.g. "stressors" in his/her past, and then using a chart to compare. For instance, list all pre-job stressors vs. all stressors related to the job. See, Mitchell v. Hutchings, 116 F.R.D. 481, (D. Utah 1987). But see, Jennings v. D.H.L. Airlines, 101 F.R.D. 549 (N.D. Ill. 1984) (records of psychologist privileged and employer prohibited from deposing psychologist despite possibility that records would show the existence of an emotional explanation for her complaint). Hopefully there will be more pre-job stressors than there will be stressors related to the job, providing your expert -- should you decide to use one -- with some ammunition.

VIII. CONCLUSION

The key to the effective use and cross-examination of expert witnesses is thoughtful preparation. Consider the potential advantages and drawbacks of employing an expert, always remembering that you need not put on the witness stand every expert you consult. Request identification of the opposing party's contemplated witnesses early in any proceeding. Do not automatically depose all experts. Likewise, do not automatically cross-examine all opposing experts. Most importantly, when making decisions concerning experts, be certain that the result is consistent with the theme you have chosen for your case.

(4) *Trial Preparation: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

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VICARIOUS LIABILITY/RESPONDEAT SUPERIOR UNDER § 1983

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Introduction

Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 690, 90 S.Ct. 201, 2035, 6 56 L.Ed.2d 611 (1978), held that local government bodies, such as school districts, can be sued directly under Section 1983 for monetary, declaratory or injunctive relief (436 U.S. at 690) and determined that they were "persons" within the meaning of 42 U.S. Section 1983. This reversed Monroe v. Pape, 365 U.S. 167 at 191, 81 S.Ct. 473, 486, 5 L.Ed.2d 492 (1961). Section 1983 gives a cause of action against the governmental entity and their employees based on the deprivation of constitutional rights involving state action.

An Official May be Held Liable as an Individual Under § 1983

Any school district employee who directly causes what would constitute as Section 1983 injury may be held personally liable. In its most recent decision of Haver v. Melo _____ U.S. _____, 57 FEP Cases 241 (1991) the court held that state officials sued in their official individual capacities are "persons" for purposes of Section 1983. "Personal-capacity suits . . . seek to impose individual liability upon a government officer for actions taken under color of state law." 57 FEP Cases at 242. "We hold that state officials sued in their individual capacities are 'persons' within the meaning of Section 1983. The Eleventh Amendment does not bar such suits, nor are state officers absolutely immune from personal liability under Section 1983 solely by virtue of the 'official' nature of their acts." 57 FEP Cases at 244-245.

Suit Against a Person in His Official Capacity is Suit Against the Government

In Haver the court reiterated its decision in Will v. Michigan Department of State Police, 491 U.S. 58, 49 FEP Cases 1664 (1989). Officials sued in their official capacity, "assume the identity of the government that employs them." See, Haver v. Melo at 243. "A suit against a state official in his or her official capacity is not a suit against the official, but rather is a suit against the official's office." 49 FEP Cases at 1669.

A School District is Not Liable Under Respondeat Superior

Prior to Monell there was a great deal of discussion and division with regard to the vicarious liability of a governmental entity such as a school district for the actions of any of its employees. Monell held:

> "We conclude that a municipality cannot be held liable *solely* because it employs a tortfeaser, or in other words, a municipality cannot be held liable under Section 1983 on a *Respondeat Superior* theory."

436 U.S. at 691, 98 S.Ct.at 2036.

Vicarious liability is not imposed on school districts based solely on misconduct of a subordinate or on negligent action or negligent supervision. See, Pembaur v. City of Cincinnati, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986).

Section 1983 liability against the school district or an employee's supervisor or school superintendent lies only where the employee's conduct was caused by an official policy or custom that was attributable to the superior official or the school district itself. A governmental entity can only be held liable or found liable under Section 1983 if it unconstitutionally "implements or executes a policy statement, ordinance, regulation or decision officially adopted or promulgated by that body's officers." Monell 436 U.S. S.Ct. at 690.

> "We conclude, therefore, that a local government may not be sued for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983."

436 U.S. at 694.

To establish the liability of a school district for the acts of a lower-level employee or a non-policy-making employee, the plaintiff must allege and prove three elements:

(1) the plaintiff possesses a constitutionally protected right or some federal right;

(2) that the plaintiff was deprived of that right; and

(3) that the deprivation was caused by an official policy or custom of the school district.

If any of these three crucial elements are not present, there is no cause of action under § 1983.

Policy or Custom

> "[T]he touchstone of the Section 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the constitution."

Monell 436 U.S. at 690; 98 S.Ct. at 2036. If there is a written rule, regulation or other official written policy adopted by an authorized policy maker, that particular provision is easily taken care of. However, "municipal liability attaches only where the decision maker possesses final authority to establish municipal policy with respect to the action ordered." Pembaur v. City of Cincinnati cited in City of St. Louis v. Praprotnik. 485 U.S. 112, 108 S.Ct., 915, 99 L.Ed.2d 107 (1988). In Pembaur, the Supreme Court held that a local government can be liable for the single act of an employee on the basis that he (the prosecutor) had final policymaking authority on behalf of the city, so the city could be held liable for his individual acts. 106 S.Ct. at 1303. In Ware v. Unified School District No. 492, 881 F.2d 906 (10th Cir. 1989), the Tenth Circuit held that the superintendent was the effective decision maker in terminating a secretary since the board had delegated that power to him. Id. at 913.

In Proprotnik four justices ruled that the authority to make or ratify official policy must be found in state and local laws. That position was reiterated by Justice O'Connor in the majority decision in Jett v. Dallas Independent School District, 109 S.Ct. 2702 at 2723 (1989). In Praprotnik the plurality opinion held that liability would be imposed for a single act only under limited circumstances: (1) the municipality officially sanctioned or ordered the act; (2) only officials who have final policymaking authority may subject the government to Section 1983 liability; (3) the determination of which particular official has "final policy-making authority" is a matter to be determined under state law; and (4) the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the entity's business. 108 S.Ct. at 924.

> "Without attempting to canvass the numberless factual scenarios that may come to light in litigation, we can be confident that state law (which may include valid local ordinances and regulations) will always direct a court to some official or body that has the responsibility for making the law or setting policy in any given area of the government's business."

Praprotnik, 924 S.Ct. at 924.

The question of which officials or governmental bodies have final policymaking authority is a legal question to be decided by the judge.

> [T]he trial judge must identify those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular

constitutional or statutory violation at issue. Jett, 109 S.Ct. at 2723.

Single Negligent Act is Not Actionable Under § 1983

In 1986 the Supreme Court reversed its prior holding in Paratt v. Taylor, 451 U.S. 527, 101 S.Ct 1908, 68 L.Ed.2d 424 (1981) when it held that mere negligence by the state employee is insufficient to trigger the protections of Section 1983. See Daniels v. Williams, 474 U.S. 327, 106 S.Ct.662, 88 L.Ed.2d 662 (1986) and Davidson v. Cannon, 474 U.S. 344, 106 S.Ct.668, 88 L.Ed.2d 667 (1986). Daniels involved a prisoner who claimed damages because a pillow was negligently left in the stairway by a deputy who was stationed at the jail, and he sustained injuries when he fell over it, and then "Petitioner alleges that he was injured by the negligence of Respondent, Custodial Official at the City Jail. Whatever other provisions of state law or general jurisprudence he may rightly invoke, the Fourteenth Amendment of the United States Constitution does not afford him a remedy." 106 S.Ct.at 665. Davidson sought damages for injuries that were inflicted upon him by another inmate because of an alleged negligent failure by state officials to protect him. Prison officials had been on notice of threats against Davidson, and he claimed that it was defendants' inaction which deprived of his liberty interest to personal security. The Supreme Court held that the alleged lack of due care by an official did not implicate constitutional due process considerations even though injury resulted. *Id.* at 670.

In *City of Oklahoma City v. Tuttle*, 471 U.S.A. 08, 105 S. Ct. 2427, 85 L.Ed.2d 7 91 (1985), the majority of the Supreme Court agreed that municipal liability under Section 1983 could not be imposed by inferring the existence of city policy from a non-policymaking employee's single instance of misconduct. *Id.* at 823-824, 105 S.Ct. at 2436. *Tuttle* involved the fatal shooting by a policeman.

While *respondeat* *superior* does not apply, plaintiffs have attempted to make the governmental entity liable by a variety of theories such as, the government's failure to act or failure to train its employees, assumption of a special relationship by the government such as protective custody or compulsory school attendance laws.

Official Inaction

In *DeShaney v. Winnebago County Department of Social Services*, U.S. 109 S.Ct. 998 (1989), the court held that the state was not liable for failure to provide medical care or to protect a child whose father was being investigated for child abuse. In *DeShaney* the state, through its social workers, had clear knowledge of possible child abuse by the father, but did nothing more than keep records of the parental abuse, and eventually the father inflicted injuries that resulted in brain damage so severe that the child is expected to spend the rest of his life confined to an institution for the profoundly retarded. The Supreme Court, through Justice Rehnquist, held that:

> "But nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors."

109 S.Ct. at 1003. Since the actions were inflicted by the child's father, a private citizen, there was no state action involved. The court looked at two basic arguments that were used. It rejected the notion that the due process clause of the Fourteenth Amendment provided any substantive right to protection by the state from the type of injury that was inflicted by his father. "Its (due process clause) purpose was to protect the people from the state, not to insure that the state protected them from each other." 109 S.Ct.at 1003. "As a general matter, then, we conclude that a state's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." Id. at 1004.

The second argument involves the alleged "special relationship" created or assumed by the state with regard to particular individuals. In this instance this was claimed to exist because the state knew that the boy faced a special danger at his father's hands. The argument is that the government acquired an affirmative duty to protect the boy from the danger and the failure to discharge that duty was an abuse of governmental power that so "shocks the conscience" as to constitute a substantive due process violation. 109 S.Ct. at 1004. This is rejected by the court, noting that the series of cases involving potential rights of prisoners or those held in state institutions "stand only for the proposition that when the state takes a person into its custody, and holds him there against his will, the constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general wellbeing." 109 S.Ct. at 1005. Since the child was not in state custody, and the actions were taken by a private individual, the state does not play any part in the creation of the injuries inflicted on the boy, so the state had no constitutional duty to protect the boy.

However, the most important aspects of this case are, in many ways, the questions that were left unanswered. In footnote 2 the court notes that it is not addressing the question as to whether the Wisconsin Child Protection Statutes give Joshua an "entitlement" to receive protective services in accordance with the terms of the statute. 109 S.Ct.at 1003. In footnote 9 the court specifies that if the state had placed Joshua in a foster home operated by its agents, "we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect." 109 S.Ct. at 1006. However, Justice Rehnquist repeats a recurring theme of his Section 1983 decisions; that the due process clause of the Fourteenth Amendment "does not transform every tort committed by a state actor into a constitutional violation." 109 S.Ct.at 1007.

When liberty is deprived, for example, potentially in a foster home situation, but clearly in a prison setting, the court noted in footnote 5 that to make an Eight Amendment claim based on failure to provide adequate medical care, a prisoner must show that the state defendant(s) exhibited "deliberate indifference" to his serious medical needs; and the mere negligent or inadvertent failure to provide adequate care is not enough. Estelle v. Gamble, 429 U.S. at 105-6, 97 S.Ct. at 291-292.

Failure to Train Brings Liability Only if There is Deliberate Indifference

In City of Canton v. Harris, 109 S.Ct. 1197 (1989), the court held that under certain circumstances a city can be held liable in civil rights actions for constitutional violations because of failure to train municipal employees only if the municipality's failure to train represents deliberate indifference to the constitutional rights of the state's inhabitants. It again repeated that respondeat superior or vicarious liability will not attach under Section 1983.

> "We hold today that the inadequacy of police training may serve as the basis for Section 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."

109 S.Ct. at 1204.

The court emphasized that "our first inquiry in any case alleging municipal liability under § 1983 is the question of whether there is a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation." 109 S.Ct. at 1203. The first thing that must be proved is that the policy itself is unconstitutional. In the City of Canton case the policy was clearly constitutional. Mrs. Harris was brought to a police station and she slipped on the floor and was allowed to lie there without receiving any medical attention. When she was released to her relatives, it was determined that she was suffering from severe emotional ailments. The Municipal Regulation authorized shift commanders to determine in their sole discretion whether detainees required medical care, and it was suggested in the testimony that the shift commanders were not provided with any special training to make a determination as to when to summon medical care for the injured detainee.

The court, after determining that the policy itself was constitutional, noted that if a city were held automatically liable under Section 1983 when one of its employees happened to apply the policy in an unconstitutional manner, the liability would rest on respondeat superior which has been rejected by the court.

The issue in a case like this is "(1) whether the training program is inadequate; and (2) if it is not, whether such inadequate training can justifiably be said to represent city policy." Id. at 1205. The court notes that the fact that an officer may be unsatisfactorily trained is not sufficient, since a program may be occasionally administered negligently.

Additionally, to be able to demonstrate that if an officer had better training, the injury would not have occurred, is not sufficient.

> "Moreover, for liability to attach in this circumstance, the identified deficiency in the city's training program must be closely related to the ultimate injury. Thus, in the case at hand, Respondent must still prove that the deficiency in the training actually caused the police officers' indifference to her medical needs."

109 S.Ct.at 1206. Plaintiff must show the policy or government's failure to train caused the injury. Justice O'Connor joined by Scalia and Kennedy would have dismissed the action without sending it back to the Court of Appeals because there was no evidence of deliberate indifference by the city. She noted that:

> "[T]hus Section 1983 is not a 'federal good government act' for municipalities. Rather, it creates a federal cause of action against persons, including municipalities, who deprive citizens of the United States of their constitutional rights.

109 S.Ct.at 1208. She clearly noted that because the claim in this type of case is really that a policy of inaction is the functional equivalent of a decision by the city itself to violate the Constitution, there must be some form of notice to the city and the opportunity to conform to constitutional dictates both in what it does and what it chooses not to do before a constitutional claim can be brought. She states that a § 1983 plaintiff must establish that the facts available to city policymakers may, as a matter of course, put them on actual or constructive notice that the particular omission is substantially certain to result in the violation of the constitutional rights of their citizens. Only

with actual or constructive notice will the dictates of Monell be satisfied because this would constitute "a deliberate choice to follow a course of action . . . from among various alternatives." 109 S.Ct. at 1208. She gives two examples when such liability might accrue:

> (1) Where a municipality fails to train its employees concerning clear constitutional duties implicated in recurring situations that a particular employee is certain to face such as the use of deadly force by police officers; and
>
> (2) Where it can be shown that policymakers are aware of, and acquiesced in, the pattern of constitutional violations involving the exercise of police discretion.

She notes that where the lower court applied the "deliberate indifference" standard multiple incidents were required for a finding of deliberate indifference; or municipality may be liable if it had notice of prior misbehavior by its officers and failed to take remedial action; or evidence of at least a pattern of similar incidents in which citizens were endangered or injured; or there is a history of widespread abuse. See cases 109 S.Ct. 1197. She quotes Justice Brennan's concurring opinion in Oklahoma City v. Tuttle, 471 U.S. 08, 831, 105 S.Ct. 2427, 2440, 85 L.Ed.2d 791 (1985) "to infer the existence of a city policy from the isolated misconduct of a single, low-level officer, and then to hold the city liable on the basis of that policy, would amount to permitting precisely the theory of strict respondeat superior liability rejected in Monell." 109 S.Ct. at 1210.

In summary, Justice O'Connor's partial dissent gives an important basis for defending against a claim based on the individual action of an employee where the theory is "failure to train" or "failure to investigate."

Abuse of Government Power

The Fifth Circuit in applying the City of Canton and DeShaney emphasized a particularly important element of proof that must be present in Section 1983 claim, but which is very often overlooked by plaintiffs in their allegations, namely, "an abuse of government power." In Collins v. City of Harker Heights, Texas, 916 F.2d 284 (1990), Collins alleged that her husband's death was caused by the city's policy of not providing safety training to its employees, that the city had notice of the risk of sending employees into manholes and that the pattern of behavior by the city was a custom and policy of deliberate indifference of the Fifth and Fourteenth Amendment rights of its employees. The District Court dismissed the claim on the "deliberate indifference" to constitutional rights standards set by the City of Canton, also noting that "an abuse of government power" was lacking. The Fifth Circuit noted that in DeShaney it was only in limited circumstances that the Constitution imposed upon the government the affirmative duties of care and protection with respect to particular individuals and these were when a prisoner or individual was in government custody or care. The contention by Collins was that the alleged deliberate indifference without more constituted the necessary "abuse of government authority." Citing its Rankin v. City of Wichita Falls, 762 F.2d 444 (5th Cir. 1985), decision, it noted that "the plaintiffs have made out at most the abuse of power which any private employer might be guilty (of), not the abuse of any particular authority or obligation held by the government" and that the injury must "be attributed to a misuse of power made possible only because the City is clothed with authority of state law. Id. at 447." Collins 916 F.2d at 288.

In Quezada v. County of Bernalillo, 944 F.2d 710 (10th Cir. 1991), the Tenth Circuit noted:

> "A word is called for about the breadth of § 1983. The law creates no rights and is not a carte blanche statute authorizing recovery for negligence or other common law torts standing by themselves. Indeed, in order to recover in federal court through § 1983, a Plaintiff must show: (1) a federal constitutional right was violated; and (2) the individual violating the constitutional right did so under color of state law. The civil rights law is not a general tool to discipline local law enforcement officers. Cites omitted. 'Thus, we will review this case not to determine whether the police officer may have committed an actionable tort against plaintiff, but rather to determine whether that conduct violated any of plaintiff's constitutional rights.' Cite omitted. We are interested in whether the sheriff's deputy abused his "official power" by his allegedly negligent conduct."

944 F.2d at 714.

DeShaney and City of Canton Applied.

In D.T. v. Independent School District No. 16, 894 F.2d 1176 (10th Cir. 1990), the Tenth Circuit held that a school district cannot be held liable under Section 1983 for the actions of a school teacher/coach who sexually molested three fifth-grade boys during a summer recess after a candy sale to support a summer sports program which was held on school district property. The court held that the sports program had nothing to do with the school district and it reversed a $134,000 damage award to the boys. Since the sports program was not school-related, the teacher could not be said to be acting under "color of state law."

The Plaintiffs tried to show a liability by the school district and administrators on the grounds that they were recklessly negligent in failing to investigate allegations against the teacher concerning prior sexual offenses, and the failure was the moving force behind the alleged constitutionally protected rights which were violated. The court stated that the school district could be held liable under Section 1983 only if plaintiffs demonstrated a direct cause or connection between the hiring, investigative and supervising policy in question and the alleged constitutional deprivation. The Court concluded that there was no nexus between the summertime sports camp and the duties and obligations owed by the coach to the district. 944 F.2d at 714.

In Graham v. Saukk Prairie Police Commission, 915 F.2d 105 (7th Cir. 1990), the issue involved the hiring procedures of the city. Since the hiring procedures, which involved written examinations, interviews, medical exams, certain pre-employment and post-employment background checks, did not directly violate any constitutional guarantees, the court applied the standard of City of Canton as to whether the allegedly inadequate acts of the city amount to "deliberate indifference to the rights of persons with whom the police come into contact." The individual officer, Mueller, was suffering from an acute exacerbation known as "schizophrenia, chronic paranoid reaction" at the time of the shooting and this was due, at least in part, to his failure to comply with prescribed use of his medication. After fairly exhaustive pre-employment checks and physicals, the department was unaware of Mueller's mental illness. It was admitted that the town failed to obtain a "Report of Medical Examination" as required by the Wisconsin Administrative Code, but the court noted that it "is well established, however, that a violation of state law is not synonymous with a violation of the Constitution. Davis v. Scherer, 468 U.S. 183, 193-196, 104 S.Ct. 3012, 2018-20, 82 L.Ed.2d 139 (1984), other cites omitted." 915 F.2d at 1102. The court also noted that while there were other types of reports that it could have obtained, such as a CIB and NCIC Report, the failure to make these checks "should not be used as a talisman for indifference to constitutional rights." Id. at 1103. Since the village took a number of reasonable steps to investigate the applicant's background, the court concluded that no reasonably jury could conclude that failure to take additional screening steps can be said to be "so obvious" as to constitute "deliberate indifference" to constitutional rights. 915 F.2d at 1104. Summary Judgment in favor of the defendant was affirmed.

Doe v. Borough of Barrington, 376 F. Supp. 729 (D.C., N.J. 1990), is a surprising case involving the AIDS issue. It involved the revelation by two city police officers that Plaintiff's husband had AIDS. Applying the Canton standard, the court granted the Plaintiff Summary Judgment Motion and held:

> "Runnemede's failure to train its officers about AIDS and the need to keep confidential the identity of those known to police to have the disease falls under the Supreme Court's definition of "deliberate indifference" that caused the violation of Doe's constitutional rights.
>
> * * *
>
> City policymakers must know to a moral certainty that their police officers will come into contact with those known or suspected to have AIDS and that transmission of the disease will cause death. The need to train officers about AIDS and its transmission and about the constitutional limitations on the disclosure of the identity of AIDS carriers is so obvious that failure to do so is properly characterized as deliberate indifference to constitutional rights."

759 F. Supp. 389-390. The city's showing that no other municipality or state agency had a policy in place was no defense from the court's point of view.

Plaintiffs also contended that the absence of a uniform policy may be viewed as an affirmative policy leaving decisions about disclosures regarding AIDS information to the discretion of individual officers and that this is unconstitutional. The city asserted that it followed the guidelines promulgated by the Attorney General of New Jersey and the state police, and, in the absence of federal or state requirement to formulate a policy, it cannot be held liable for failure to formulate such a policy. The court held that by deliberately choosing to not formulate a policy, they were not absolved from liability for its constitutional violations for failure to train. However, under the standard of Pembaur v. Cincinnati, 475 U.S. 469-480, leaving the disclosure decision to individual officers cannot rise to the level of official policy because it does not establish a fixed plan of action to be followed under similar circumstances and cannot result in consistency. Summary Judgment was granted on the failure to train theory; it was denied on failure to have a policy.

In Pagano v. Massapequa Public Schools, 714 F. Supp. 641 (E.D. N.Y., 1989), the court refused to dismiss a claim by a student against the school district that he was the target of physical and verbal abuse by other students resulting in physical and mental injury. He alleged seventeen such incidents and alleged that the district and administrators were aware of the attacks and failed to take necessary steps to prevent them. The court essentially recognized a "special relationship" between the student and the government which gave rise to the government's duty to protect the person from harm thereby giving the constitutional right for Section 1983 purposes. It noted that the DeShaney court had refused to reach the question of whether a duty exists if the child had been placed in a foster home by a state agency and had been abused there. The court considered elementary school students who are required to attend school, with the truancy laws still being in effect, to be owed some duty of care by the Defendants which may or may not rise to the level required; thus avoiding the standard for a motion to dismiss.

In Jane Doe v. Special School District of St. Louis County, 901 F.2d, 642 (8th Cir. 1990), the bus driver of the district was arrested for sexual abuse and pled guilty to charges of child abuse involving five children. The District Court granted Summary Judgment on the basis that the district had a policy of constantly ignoring complaints of physical or sexual abuse. The Court of Appeals reversed. While there had been some complaints about the bus driver, none of them were specifically alleging physical or sexual abuse; other reports involved kissing a boy and use of foul language. Failure of the school district's director of transportation and garage supervisor to act on those complaints did not amount to deliberate indifference to or attach an authorization of the alleged physical or sexual abuse of plaintiffs. The court held that to establish the existence of governmental custom or failure to receive, investigate or act on complaints of violations of constitutional rights, a plaintiff must prove:

> "(1) The existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees;
>
> (2) Deliberate indifference to or tacit authorization of such misconduct by the governmental entity's policymaking officials after notice to the officials of that misconduct; and
>
> (3) That Plaintiff was injured by acts pursuant to the governmental entity's custom, i.e., that the custom was the moving force behind the unconstitutional violation." Cites omitted.

901 at F.2d 646.

The court noted that, viewed in retrospect, some of the bus driver's pre-arrest conduct portrayed his true nature, but stated

> "If negligence could form the basis of a finding of liability, plaintiffs' showing might have been adequate to take the case to a jury. Measured against the deliberate indifference official-policy-standard-of-liability, however, plaintiffs have failed to establish a submissible case."

901 F.2d at 647.

Thelma by Delores A. v. Board of Education, 934 F.2d 926 (8th Cir. 1991), affirmed the summary judgment granted tot he board in a case involving six (6) sexually abused students who filed suit against the board alleging the board had failed to investigate and act upon their complaints. The superintendent immediately removed the teacher when he was arrested for sexually molesting students. The court noted that in a school system of over 4,000 employees, five (5) complaints scattered over a 16-year period could not, as a matter of law, constitute a persistent and widespread pattern amounting to constitutional misconduct. The claim that the district's child abuse training program procedures were inadequate failed under the "deliberate indifference" test since the procedures had worked in a prior case where the teacher was discharged after an investigation.

In Garcia v. Meira, 817 F.2d 650 (1987), the Tenth Circuit held in a case involving allegations of substantive due process rights that because of an excessive degree of corporal punishment against a student, Ingraham v. Wright, 430 U.S. 651, "requires us to hold that, at some point, excessive corporal punishment violates the pupil's substantive due process rights. Id. at 653. "Although Ingraham makes clear only that corporal punishment violates no substantive due process rights of school children, by acknowledging that corporal punishment implicates a fundamental liberty interest protected by the Due Process Clause, we believe that the opinion clearly signaled that, at some degree of excessiveness or cruelty, the meting out of such punishment violates the substantive due process rights of the pupil." 817 F.2d at 654. The case involved a series of incidents of corporal punishment where the "paddling" drew blood, created a two-inch cut on her leg, and left a permanent scar, severe bruises on the buttocks which did not stop hurting for two to three weeks, and injury to her back causing pain for several weeks.

In another pre-City of Canton case, the Fifth Circuit in Lopez v. Houston Independent School District, 817 F.2d 351 (5th Cir. 1987), held that the failure of the school district to provide adequate training to a bus driver who did not intervene in a fight and did not take the student directly to the hospital when he could have done so, did not serve as a basis for a § 1983 liability unless "the failure to train amounts to a reckless disregard for or deliberate indifference to the rights of persons within the City's domain." 817 F.2d at 354. Since the court determined that the record did not suggest the preexisting pattern of student fights on the buses constituting a widespread problem mandating an official response, the failure of the school district to provide allegedly inadequate training did not meet the deliberate indifference standard, and the argument that the bus driver had been delegated policymaking authority because he was allowed the discretion to exercise his independent judgment does not establish a § 1983 violation by the governmental entity. Pembaur. 106 S.Ct. at 1299. The Fifth Circuit reversed the grant of summary judgment in favor of the bus driver individually on the theory that a trier of fact could find callous indifference by the bus driver for the constitutional rights of the student. "Bradford was entrusted with the care of students attending school under Texas compulsory education statute, and citing Horton v. Goose Creek Independent School District, 690 F.2d 470, 480 (5th Cir., 1982) (which held that there was a duty to protect students from harm opposed by anti-social activities), cert. denied for 63 U.S. 1207 (1983), his alleged failure to protect a student or to render emergency aid abuses state power and supports § 1983 action if the jury finds it rose to the level of callous indifference and was a cause of the injury." 817 F.2d at 356.

The Stoneking Cases

One of the most significant cases on the issue of the liability of the school district for sexual misconduct by a teacher with the students is Stoneking v. Bradford Area School District, 882 F.2d 720 (3rd Cir. 1989). That was the second decision, Stoneking II, by the Third Circuit. The initial decision, Stoneking v. Bradford Area School District, 856 F.2d 594 (3rd Cir. 1988), (Stoneking I) vacated sub nom. Smith v. Stoneking, ___ U.S. ___, 109 S.Ct. 1333, 103 L.Ed. 804 (1989). Kathleen Stoneking filed a § 1983 lawsuit against the school district, the principal (Smith), the assistant principal, and the superintendent (Shuey). She alleged that Wright, the band director at the high school, used physical force, threats, reprisal, intimidation, and coercion to sexually abuse and harass her and force her to engage in various sexual acts when she was a high school student and even after her graduation. Some of the acts occurred in the band room at the high school and on trips for band functions and others in Wright's car and his house when she babysat or after he gave her music lessons. Stoneking averred that another female student complained about Wright's alleged attempt to rape or sexually assault her and the principal, Smith, had maintained a personal file on Wright which he kept at his home and did not make part of his regular personnel file. There were other complaints of sexual misconduct against another teacher where Smith had failed to take any specific disciplinary action against the teacher other than telling him not to have one-on-one contact with students.

In Stoneking I, the Third Circuit had held that under applicable state law, a "special relationship" arose between the school officials and students entrusted to their care, and the Pennsylvania Child Abuse Reporting and in loco parentis statutes coupled with broad common law duty of officials to students, evidenced a desire on the part of the state to provide affirmative protection to students. The case was remanded by the Supreme Court to be reconsidered in the light of DeShaney, and while the Third Circuit believed that the situation of school children "may not be dissimilar to that of children in foster care homes mistreated by their foster parents," 882 F.2d at 724, the court believed it was more expedient to not rely on the special relationship standard.

It is significant that the § 1983 lawsuit is not against Wright, the band teacher who had plead guilty to various sex related crimes, but was against the school district and individual administrators. The court is at pains to say that this is not a "respondeat superior" case; the plaintiff is not alleging vicarious liability because of Wright's actions, but claims that defendants are liable:

> "because of their own actions in adopting and maintaining a practice, custom or policy or reckless indifference in instances of known or suspected sexual abuse of students by teachers, in concealing complaints of abuse, and in discouraging students' complaints about such practices. She argues that these practices, customs, or policies create a climate, which, at a minimum, facilitated sexual abuse of students by teachers in general, and that there was a causal relationship between these practices, customs or policies in the repeated sexual assaults against her by Wright. Thus, this is not respondeat superior in another guise, but assertion of liability against the individual defendants based on theories recognized in the line of Supreme Court cases."

82 F.2d 724-5. They also note that: "Liability of municipal policy makers for policies or customs chosen or recklessly maintained is not dependent upon the existence of a 'special relationship.'" Based on 882 F.2d at 725, the court reiterate(d),

"The conclusion we reached in Stoneking I, that the constitutional right Stoneking alleges, to freedom from invasion of her personal security through sexual abuse was well established at the time the assaults upon her occurred." 882 F.2d 726. Based on the discovery information that the principal had been put on notice of allegations of sexual misconduct by teachers and had either taken no action against the teacher or had acted in such a fashion as to discourage complaints by students of sexual misconduct by their teachers, the court held that Stoneking had made out a colorable claim that the actions or inactions of the administrators constituted a practice, custom or policy of reckless indifference to known or suspected sexual abuse of students, and discouraged students' complaints about such conduct. On the issue of qualified immunity, which was essentially the primary issue in Stoneking II, the superintendent was granted summary judgment since there was insufficient evidence to indicate that he took or failed to take any action as a result of the allegations by students.

Stoneking II underscores the fine line between "vicarious liability" as the underlying theory and a claim of "deliberate indifference" constituting a policy or custom adopted by a policy-making actor within the school district. Stoneking also underscores the problem faced by any school district in defending a case involving sexual misconduct by a teacher against students. By leaving the door open on the "foster home" question, the Supreme Court in DeShaney virtually invited district courts and courts of appeal to find that school districts have a positive obligation to protect students from sexual misconduct by the teachers. That raises the problem of "failure to investigate and failure to train." Where a state requires a district to make certain background checks of a teacher and to check criminal records for sexual misconduct (Colorado has such a requirement, §§ 22-32, 109.7 et seq.), does the failure on the part of the school district to do so, coupled with the subsequent sexual misconduct by the teacher give rise to § 1983 liability?

Stoneking Distinguished.

In a most recent case in the United States District Court in Colorado, Doe v. Douglas County School District RE-1, 770 F.Supp. 591 (D.Colo. 1991), the plaintiff student sued the school district based on the alleged sexual molestation by a school psychologist. The alleged improper conduct occurred both on and off school property. The issues on the motion to dismiss were whether the school district had a constitutional duty to protect the plaintiff and whether it was deliberately indifferent to and caused the deprivation of plaintiff's constitutional rights.

On the affirmative duty to protect the court relied on DeShaney and a recent case of J.O. v. Alton Community Unit School District 11, 909 F.2d 267 (7th Cir. 1990). On the question of whether an affirmative duty to protect students from sexual molestation by teacher arises in a school environment, the court held:

> Given the prohibition against *respondeat superior* liability in § 1983 suits, see, Monell, (cite omitted), the plaintiffs also do not argue the school defendants are liable merely as child molester's employers. Instead, both in the district court and in this court, the plaintiffs argue that the school defendants had a "special relationship" to the school children, imposing an affirmative duty to provide for their safety and to prevent the child abuse that occurred in this case.
>
> * * *
>
> We do not suggest that prisoners and mental patients are an exhaustive list of all persons to whom the state owes some affirmative duties, but the government acting through local school administrations, has not rendered its school children so helpless that an affirmative constitutional duty to protect arises.

J.O., 909 F.2d at 272.

It concluded that the compulsory attendance statutes do not change that result. "It cannot be suggested that compulsory school attendance makes a child unable to care for basic human needs. The parents still retain primary responsibility for feeding, clothing, sheltering, and caring for the child." 909 F.2d at 272.

In Douglas County, Judge Babcock held that the Alton decision does not conflict with Stoneking II because Stoneking II relied on the deliberate indifference standard. On the claim of deliberate indifference, the court construed the claim to be that the district had a policy of reckless indifference to instances of known or suspected sexual abuse by the psychologist, that the district failed to supervise, control, and follow up on his activities, and it had a policy of not maintaining and implementing procedures to protect students from sexual advances of teachers. The court held that the plaintiff may be able to establish the existence of such a custom, practice, or policy causing the deprivation of constitutional rights and denied summary judgment on that grounds.

Causation

When does an official policy or custom cause an employee to commit an action that gives rise to § 1983 claim? In Canton, the court states:

> "Moreover, for liability to attach in this circumstance, the identified deficiency in city's training program must be closely related to the ultimate injury. Thus, in the case at hand, the respondent must still prove that the deficiency in training actually caused the police officers' indifference to her medical needs. Would the injury have been avoided had the employee been trained under a program that was not deficient in the identified respect? Predicting how hypothetically a well trained officer would have acted under the circumstances may not be an easy task for the fact finder, particularly since matters of judgment may be involved, and since officers who are well trained are not free from error and perhaps might react very much like the untrained officer in similar circumstances. But judge and jury, doing their respective jobs, would be adequate to the task."

109 S.Ct. at 1206.

The causation standards specified in City of Canton, and emphasized by the partially dissenting opinion of Justice O'Connor, is extremely important and the constant reference to "abuse of governmental authority" as a key element in the Section 1983 lawsuit needs to borne in mind.

State laws generally require some training of teachers regarding child abuse. Does the school district's failure to either implement such training or failure to implement it in an adequate fashion reflect deliberate indifference to the constitutional rights of students? Then, does the failure to train cause the constitutional violation; is it the "moving force" behind this violation by the individual employee?

In Rizzo v. Goode, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976), the Supreme Court held that municipalities and their supervisory personnel are not liable for civil rights violations caused by individual police officers employed by the municipalities unless the plaintiff demonstrates "[a]n affirmative link between the occurrence of the various incidents of policy misconduct and the adoption of any plan or policy--express or otherwise--*showing their authorization or approval of such misconduct*." Id. at 371, 96 S.Ct. at 604.

In Springfield v. Kibbe, 480 U.S. 257, 267, 27, 107 S.Ct. 1114, 1120, 94 L.Ed.2d 293 (1987) (O'Connor, J., dissenting) observed:

> Given the importance, under § 1983, of distinguishing between direct and vicarious liability, the Court repeatedly has stressed the need to find a direct causal connection between municipal conduct and the constitutional deprivation. See, e.g., Oklahoma City v. Tuttle, 471 U.S. [808] at 824-25, n. 8 [105 S.Ct. 2427, 2436 n. 8, 85 L.Ed.2d 791] (requiring 'affirmative link' between municipal policy and constitutional violation); Polk County v. Dodson, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981) (municipal policy must be the 'moving force' behind constitutional deprivation).... When the execution of municipal policy does not compel a

> constitutional violation, however, the causal connection between municipal policy and the deprivation of constitutional rights becomes more difficult to discern. In some sense, of course, almost any injury inflicted by a municipal policy and the deprivation of constitutional rights becomes more difficult to discern. In some sense, of course, almost any injury inflicted by a municipal agent or employee ultimately can be traced to municipal policy.

A case to review closely when dealing with causation issues under § 1983 is Martinez v. California, 444 U.S. 277 (1980), which dealt with proximate cause. Plaintiffs were the survivors of a girl who was raped and killed by a parolee five months after he was paroled, and the survivors sued the state parole board under § 1983 for allegedly negligent and reckless decision to release a prisoner, Thomas. In a decision written by Justice Stevens, the court held that there was no § 1983 cause of action, because Thomas, not the state, had deprived the girl of her life. "[W]e hold that, ...appellees did not 'deprive' appellants' decedent of life within the meaning of the Fourteenth Amendment. Her life was taken by the parolee five months after his release. He was in no sense an agent of the parole board. 444 U.S. at 285. The court also concluded that "but we do hold that at least under the particular circumstances of this parole decision, appellants' decedent's death is too remote a consequence of the parole officer's action to hold him responsible under the Federal Civil Rights Law. Although a § 1983 claim has been described as 'a species of tort liability' (cites omitted) it is perfectly clear that not every injury in which a state official has played some part is actionable under the statute." 444 U.S. at 285.

In employment discrimination cases, or retaliation cases where the perpetrator of the discrimination or retaliation is not a "policymaker" or an "actor" with authority to terminate the employee, the issue of causation and the standards on respondeat superior may become quite significant. An example is in the so-called "mixed motive" termination cases when an investigation by a principal or an assistant superintendent may have been conducted in a fashion which violated some due process rights, but the investigation resulted in the development of facts which under normal circumstances would have been grounds for termination and, in fact, resulted in the termination of the employee. The criminal cases involving the "fruit of the poison tree" have been applied by the Supreme Court in the causation analysis in this type of case. The controlling Supreme Court case on mixed motive termination deals specifically with the causation inquiry and the "chain of events" theory.

> In other areas of constitutional law, this Court has found it necessary to formulate a test of causation which distinguished between a result caused by a constitutional violation and one not so caused. We think those are instructive in formulating the test to be applied here.

Mt. Healthy School Dist. v. Doyle, 429 U.S. at 286, 97 S.Ct. at 575.

Justice Renquist then went on to cite Lyons v. Oklahoma, 322 U.S. 596, 64 S.Ct. 1208, 88 L.Ed. 1481 (1944); Nardone v. United States, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939); Wong

Sun v. United States, 371 U.S. 471, 491, 83 S.Ct. 407, 419, 9 L.Ed.2d 441 (1963); and Parker v. North Carolina, 397 U.S. 790, 796, 90 S.Ct. 1458, 25 L.Ed.2d 785 (1970). He noted that Parker and Wong Sun relied on the oft-quoted language from Nardone, "The connection between the arrest and the statement (given several days later) had 'become so attenuated as to dissipate the taint,' Nardone v. United States, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939)." 371 U.S. at 491. This Court then concluded:

> While the type of causation on which the taint cases turn may differ somewhat from that which we apply here, those cases do suggest that the proper test to apply in the present context is one which likewise protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights.

429 U.S. at 287, 97 S.Ct. at 576.

Conclusion

Despite the fact that the Supreme Court has clearly stated that the doctrine of respondeat superior or vicarious liability does note apply in § 1983 claims, it is very often quite difficult to draw the distinction that the courts make between respondeat superior and finding liability on some other theories such as failure to train or assumption of a specific responsibility. In City of Canton, while the Supreme Court's legal analysis was quite precise, it still failed to grant summary judgment even though its own summary of the facts indicated that there were not sufficient facts to support a jury finding of deliberate indifference. If the individual employee who was the primary actor in the case is not a defendant and it appears that the real theory in the case is based on respondeat superior, the best approach is to do sufficient discovery and, if possible, wait until the pleadings are closed to file for summary judgment in order to avoid the possibility of the pleadings being amended to bring the cause of action against the individual, especially where state statutes provide for indemnification.

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VICARIOUS LIABILITY/UNDER "COLOR OF LAW"

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"Trial Tactics In School Civil Rights Cases"
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I. GOVERNMENTAL LIABILITY FOR THE SCHOOL DISTRICT

School districts are liable under 42 U.S.C. § 1983 when "official policy" causes a person to be deprived of rights secured by the U.S. Constitution or by federal statute. Official policy includes (1) the policies, regulations, or decisions officially adopted by the school board, (2) the acts and decisions of employees to whom final policymaking authority has been delegated, and (3) widespread practices of employees, of which the board or its delegated policymaker has actual or constructive knowledge, which are so common and well-settled as to constitute a custom of the school district. Absent "official policy," a school district is not liable under § 1983 solely because one of its employees violates a person's federal rights.

For a summary of the Supreme Court decisions addressing the governmental liability of school districts, from Monell v. New York City Dept. of Social Services, 98 S.Ct. 2018 (1978) to Jett v. Dallas Independent School District, 109 S.Ct. 2702 (1989), see the attached article at the end of this outline. Hairston, Joe B., "*The Scope of Civil Rights Liability of School District and Their Employees under 42 U.S.C. § 1983*," Texas School Administrators' Legal Digest (October 1989).

Damages to compensate for actual injuries caused by a violation of federal rights may be awarded for out-of-pocket losses and other monetary harm, impairment of reputation, personal humiliation, and mental anguish and suffering, but may not be awarded for the abstract value of the right that was violated. Memphis Community School District v. Stachura, 106 S.Ct. 2537 (1986). In the absence of any provable injury caused by a denial of federal rights, nominal damages (i.e., $1.00) and attorneys' fees still may be awarded. Carey v. Piphus, 98 S.Ct. 1042 (1978).

The absence of school district liability due to the absence of "official policy" as causing a violation of the plaintiff's federal rights can readily be shown with a motion for summary judgment that establishes the official policy of the district and who its policymakers are. Jane Doe A. v. Special School District of St. Louis County, 901 F.2d 642 (8th Cir. 1990); Lopez v. Houston Independent School District, 817 F.2d 351 (5th Cir. 1987); Gonzales v. Brown, 768 F.Supp. 581 (S.D. Tex. 1991). If the motion is denied, error must be preserved by filing pre-verdict and post-verdict motions for judgment as a matter of law that raise the issue. Spann for Spann v. Tyler Independent School District, 876 F.2d 437 (5th Cir. 1989).

II. SUPERVISORY LIABILITY OF THE SCHOOL DISTRICT AND ITS EMPLOYEES

Since the above article was written, liability under 42 U.S.C. § 1983 also increasingly is being litigated in the context of constitutional torts, under various "deliberate indifference" theories of supervisory liability. The theories do not seek to hold the school district or its individual supervisors vicariously liable for the acts of subordinates, but instead seek to hold them liable for their own failure to act. The theories use the rationale that the school district and/or the school administrators were deliberately indifferent to constitutional rights of the plaintiff and that the district's/administrator's inaction in failing to train subordinate employees or in failing to investigate complaints of unconstitutional acts of subordinate employees caused the deprivation of the plaintiff's constitutional rights. "[D]eliberate indifference to the constitutional rights of persons" must be shown before liability can attach under § 1983 for a failure to train. City of Canton v. Harris, 109 S.Ct. 1197, 1204 (1989). Deliberate indifference is the standard, rather than gross negligence. Id., at n.7. It will not suffice for the plaintiff "to point to something that the [government] 'could have done' to prevent the unfortunate incident," rather the plaintiff must show that the there was a "deliberate choice" and a "'conscious' choice" to be indifferent to the plaintiff's constitutional rights. Id., at 1205-06.

The 8th Circuit has best articulated the deliberate indifference standard of § 1983 supervisory liability for school districts and individual administrators in the context of constitutional torts arising in the school setting.

For the school district's supervisory liability: "We have held that to establish the existence of a governmental custom or failure to receive, investigate, or act on complaints of violations of constitutional rights, a plaintiff must prove:

(1) The existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by governmental employees;

(2) Deliberate indifference to or tacit authorization of such conduct by the governmental entity's policymaking officials after notice to the officials of that misconduct; and

(3) That plaintiff was injured by acts pursuant to the governmental entity's custom, i.e., that the custom was the moving force behind the constitutional violation."

Jane Doe A. v. Special School District of St. Louis County, 901 F.2d 642, 646 (8th Cir. 1990).

For the school administrators' supervisory liability: "The individual [supervisory] defendants are subject to personal liability only if it can be proved that they:

(1) Received notice of a pattern of unconstitutional acts committed by subordinates;

(2) Demonstrated deliberate indifference to or tacit authorization of the offensive acts;

(3) Failed to take sufficient remedial action; and

(4) That such failure proximately caused the injury to the [plaintiff]."

Jane Doe A., 901 F.2d at 645.

III. UNDER COLOR OF STATE LAW

"Two elements must be proven to recover under Title 42, U.S.C. § 1983, (1) a deprivation of a constitutional right by the defendant, and (2) that the defendant acted under 'color of state law.'" Smith v. Young Men's Christian Ass'n of Montgomery, 462 F.2d 634, 647 (5th Cir. 1972); Paul v. Davis, 96 S.Ct. 1155 (1976). "Section 1983 does not reach purely private conduct." Hagerty v. Succession of Clement, 749 F.2d 217, 221 (5th Cir. 1984). A person acts under color of state law when there is a "[m]isuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." United States v. Classic, 61 S.Ct 1031, 1043 (1941).

A public official's private acts are not taken under color of state law when his acts are "no different from those of any private citizen." Smith v. Winter, 782 F.2d 508, 512 (5th

Cir. 1986). Acts of a state officer in the ambit of his personal pursuits are not acts under color of state law. Screws v. United States, 65 S.Ct. 1031 (1945). A state, its agencies, or its officials may not be assessed liability for the acts of a private individual, except by a fair attribution of those actions to the state. Lugar v. Edmondson Oil Co., Inc., 102 S.Ct. 2744, 2753-54 (1982). "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law" and avoids the imposition of responsibility on the State for conduct it could not control. Id.

"In the typical case raising a state action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action. This may occur if the state creates the legal framework governing the conduct; if it delegates its authority to the private actor; or sometimes if it knowingly accepts the benefits derived from unconstitutional behavior. Thus, in the usual case, we ask whether the State provided a mantle of authority which enhanced the power of the harm-causing individual actor." (Citations omitted.) National Collegiate Athletics Association v. Tarkanian, 109 S.Ct. 454, 462 (1988).

For example, in D.T. by M.T. v. Independent School District No. 16, 894 F.2d 1176, 1188-92 (10th Cir. 1990), the court concluded that the teacher who sexually molested students during the summer was not acting under color of state law. The assaults occurred when the teacher was "absolutely free from all obligation or duty to the school district" at a voluntary summer basketball camp attended by the plaintiffs, even though the camp was held on school property. The summer activities of the camp were not related to school activities, and the teacher actions were not taken under color of state law. The court contrasted its facts with those from Stoneking v. Bradford Area School District, 882 F.2d 720 (3rd Cir. 1989), where the court held that the teacher who had sexually abused students had acted under color of state law. The teacher's abuse in Stoneking had occurred during his performance of official responsibilities (e.g., during school sponsored events and trips) and sometimes on school property at times when the teacher was subject to the control by the district in his performance of his duties.

For example, in Brown v. Miller, 631 F.2d 408 (5th Cir. 1980), a city mayor wrongfully withheld and forged an employee's paycheck. The mayor's action was found to be taken under color of state law, because he possessed the power to take the wrongful action "solely because he held the office of mayor." As the mayor, the man had the authority to sign employee paychecks, and he only had access to the checks because he was mayor. The man did have power over paychecks that was different from that possessed by private citizens, and his wrongful acts were clothed with the authority of state law and amounted to a misuse of power under color of state law. In contrast, in Delcambre v. Delcambre, 635 F.2d 407 (5th Cir. 1981), a police chief's assault of his sister-in-law while on duty at the police station was not action taken under color of state law. The facts showed that none of the acts complained of were made possible solely because of the office that the defendant held. The police chief had not arrested or threatened the arrest of his sister-in-law, but had simply assaulted her following an argument over family and political matters.

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THE SCOPE OF FEDERAL CIVIL RIGHTS LIABILITY OF SCHOOL DISTRICTS AND THEIR EMPLOYEES UNDER 42 U.S.C. § 1983

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School administrators are aware that many of the federal lawsuits filed against school districts and their employees often are referred to as "§ 1983" suits. While other federal statutes protect more specific rights, the federal statute codified as section 1983 of volume 42 of the United States Code (hence, 42 U.S.C. § 1983) provides a broad basis for litigation in federal court. Section 1983 was enacted in 1871 shortly after the Civil War and was designed to protect the civil rights of citizens. It reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In essence, section 1983 grants the litigant the right to hold liable every person who has deprived the litigant of rights protected by the U.S. Constitution or by federal law, when that person has done so acting under color of state law. Section 1983 does not reach purely private conduct because such conduct is not taken "under color of state law" as is required. Liability attaches under § 1983 only to a person who carries a "badge of authority" of a state or local government.[1]

A section 1983 suit thus basically involves a charge of an abuse of governmental authority which deprives someone (e.g., a student, a teacher) of federally protected rights. The rights at stake can range from a student's Fourth Amendment right to be free from an unreasonable search to an employee's First Amendment right to speak out as a citizen on matters of public concern. While § 1983 speaks of holding "every person" liable, the scope of liability under the statute is not unlimited. The federal courts apply different tests to determine the liability of the government, itself, as opposed to the personal liability of officers and employees of the government. That difference is the subject of this article.

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GOVERNMENTAL LIABILITY

The landscape of federal civil rights liability changed dramatically in 1978, when the U.S. Supreme Court handed down its decision in *Monell v. New York City Dept. of Social Services.*[2] At issue in *Monell* was whether § 1983's language that "every person" could be held liable, included governmental entities such as municipalities and school districts. Reversing its own prior decisions, the Supreme Court in *Monell* held that governments are indeed "persons" and subject to liability for damages under § 1983. With that single decision, the Court ushered in a new era of spirited federal civil rights litigation.

There is, however, one critical limitation upon governmental liability. As the Court explained in *Monell* and often thereafter, government is not liable merely because a governmental employee commits a wrong that deprives someone of his federal rights. That sort of liability is referred to in the law as *respondeat superior,* a Latin term meaning "hang the boss." It is *respondeat superior* that allows the injured party to sue the deep-pocket brewery when a shallow-pocket driver runs over him with the beer delivery truck. Such is not the case with civil rights liability.

Under *Monell* and its ample progeny, the governmental entity can be held liable only if the wrong is committed pursuant to either an official policy of the government or a "custom" even though the custom has not received formal approval through the governmental body's official decisionmaking channels. Thus, the entity may be held liable only when the injury is inflicted by a government's "lawmakers or by those whose edicts or acts may fairly be said to represent official policy."

Monell cuts both ways as to liability. The government cannot be held liable merely because it happens to employ a wrongdoer; it can, however, be held liable if the wrong is done pursuant to a policy or custom of the government itself. In effect, the Court is attempting to distinguish between good citizens who elect good government but happen to employ a wrongdoer, and sorry citizens who elect sorry government which sets about violating federally protected rights, whether by formal policy or unwritten custom. Good government does not pay; bad government does. The theory is reasonable and even admirable. In practice, however, whether a particular wrong involves a policy or custom has proven to be an inquiry of much complexity. A few cases will illustrate.

In 1985, the Supreme Court decided *City of Oklahoma City v. Tuttle.*[3] The case involved an Oklahoma City policeman who used excessive force in dealing with a drunk, the force in question being shooting and killing the man. While the bereaved widow sued the policeman, she was more interested in imposing liability upon the city and obtaining her damages from its deep pockets.

In light of *Monell,* widow Tuttle had to demonstrate that the policeman's violation of her late husband's civil rights occurred pursuant to a policy or custom of the city. She did not claim that the city had a policy authorizing its policemen to use excessive force. Rather, she contended that the city policy concerning the training and supervision of police officers (1) resulted in their being inadequately trained regarding the appropriate use of force, (2) deprived her husband of his constitutional rights, and (3) led to his death.

The Supreme Court in *Tuttle* faulted the trial court's instruction to the jury. The instruction allowed the jury to infer a thoroughly nebulous "policy" of "inadequate training" on the part of the city from the single incident involving Tuttle. The instruction further allowed the jury to hold the city liable "based solely upon proof that it employed a non-policymaking officer who violated the Constitution." The instruction to the jury was defective. The Court concluded that proof of a single incident of unconstitutional activity is not sufficient to hold the government liable under *Monell,* unless it also includes proof that the incident was caused by an existing, unconstitutional governmental policy which can be attributed to a governmental policymaker.

So who is a policymaker? Clearly governmental entities normally do not adopt formal policies which provide for violation of federal rights. What if the wrong is done by "those whose edicts or acts may fairly be said to represent official policy," rather than by a policeman responding to a disturbance in an Oklahoma City bar? Such was the case in the Supreme Court's 1986 decision, *Pembaur v. City of Cincinnati.*[4]

Pembaur was a doctor suspected of harboring in his clinic two persons who had been issued subpoenas by the grand jury. Pembaur refused to allow deputy sheriffs entry into part of his clinic. The deputy sheriffs consulted their supervisor who told the deputies to call the assistant prosecutor; the assistant prosecutor conferred with the county prosecutor; the county prosecutor issued instructions to "go in and get" the witnesses sought by the grand jury. Cincinnati police officers who had become involved dutifully obtained an ax and chopped down the doctor's door. The deputies searched the clinic and found two individuals who fit the descriptions of the witnesses sought but who,

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alas, turned out not to be the right persons. Pembaur alleged that the warrantless search of his clinic violated the Fourth Amendment to the U.S. Constitution and sought to impose liability upon the city and the county for the actions of the police officers and deputies.

In light of *Monell,* the issue before the Supreme Court in *Pembaur* was whether the search of the doctor's clinic had been pursuant to official policy. The Court noted that the "official policy" requirement distinguishes the acts of the government, itself, from the acts of employees of the government. Governmental liability is limited to action for which it is actually responsible.

The Court in *Pembaur* determined that governmental liability may be imposed for a single unconstitutional decision by a policymaker under appropriate circumstances, as for example a single decision by the governmental body itself. In the absence of formal action by the governmental body, however, liability may still attach where a governmental official has been granted or delegated final authority to establish policy with respect to the particular action at issue. That a governmental official has discretion in how he exercises his functions, does not make his decisions those of a policymaker for which the government is responsible. Rather, governmental liability under § 1983 attaches where the official or officials responsible for establishing final governmental policy for a particular activity make a deliberate choice from among various alternatives and order or authorize an unconstitutional act.

In the particular facts of *Pembaur,* the Court held that the county prosecutor made a considered decision based on his understanding of the law and commanded the officers forcibly to enter Pembaur's clinic. That decision directly caused the violation of Pembaur's Fourth Amendment rights. Finally, the Court held that in ordering the police officers and deputy sheriffs to go in and get the supposed witnesses, the county prosecutor "was acting as the final decisionmaker for the county, and the county may therefore be held liable under § 1983." In other words, the county prosecutor was a person "whose edicts or acts may fairly be said to represent official policy."

Both *Tuttle* and *Pembaur* involved a single, wrongful act. In *Tuttle* the wrongful act was committed by a non-policymaker without proof that he was acting pursuant to a policy or custom of the city. In *Pembaur* the wrongful act was committed by a policymaker, the county prosecutor, and because he was a policymaker, the county could be held liable.

Another recent Supreme Court pronouncement on the "policy or custom" issue is the 1988 decision *St. Louis v. Praprotnik.*[5] Having noted the *Monell* precedent and the different holdings of *Tuttle* and *Pembaur,* the Supreme Court in *Praprotnik* took another stab at the question of who qualifies as a policymaker. The situation in *Praprotnik* involved a personnel dispute, a more familiar and mundane set of facts than those in *Tuttle* and *Pembaur.* The question turned on who had the authority to establish "final" policy for the transfer and layoff of city employees.

The Court began by noting that the identification of a policymaker is a question of state and local law. Official policy can only be adopted by those legally charged with doing so. The Court observed that when a governmental employee's discretionary decisions are constrained by policies not of that employee's making, those policies, rather than the employee's conduct in departing from them, are the act of the government. Similarly, when a subordinate's decision is subject to review by the government's authorized policymakers, then they have retained the authority to measure the official's conduct for conformance with the authorized policymaker's policies. Further, the mere failure of policymakers to investigate the basis of a subordinate's discretionary decisions does not amount to a delegation of policymaking authority, especially where the wrongfulness of the subordinate's decision arises from a retaliatory motive or other unstated rational. In none of these instances is the subordinate employee's conduct that of a policymaker for which the government is liable. However, if the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the government because their decision is final. Governmental liability attaches only where the decisionmaker possesses final authority to establish the policy at issue.

The most recent Supreme Court pronouncement on the policymaker issue is Texas' own *Jett v. Dallas Independent School District.*[6] The Court in *Jett* begins by noting *Praprotnik's* teaching that whether a particular official has final policymaking authority is a question of state law, a legal question to be resolved by the trial judge before the case is submitted to the jury. Reviewing the relevant state and local law, as well as custom or usage having the force of law, the trial judge must identify those officials or governmental bodies who speak with "final policymaking authority" for the governmental entity concerning the act alleged to have caused the particular constitutional or statutory violation. Once those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether their decisions have caused the deprivation of rights at issue "by policies which affirmatively command that it occur . . . or by the acquiescence in a longstanding practice or custom which constitutes the 'standing operating procedure' of the local governmental entity."

The preceding discussion of governmental liability began with *Monell's* holding that government could be held liable in § 1983 actions but only if the wrong were done pursuant to a policy or custom of the entity, and ended with *Jett's* refinements regarding the specific duties of the trial judge and the jury in determining liability. Taken together, these cases impose a heavy burden upon a plaintiff who seeks to hold a Texas school district liable for an alleged wrong done by one of its employees. A school superintendent's "edicts and acts may fairly be said to represent official policy" in some circumstances. On the other hand, how can the superintendent be a policymaker in most situations in view of *Praprotnik's* teaching that: (1) the authority to make governmental policy is necessarily the authority to make *final* policy; (2) when an official's discretionary decisions are constrained by policies not of the official's making, those policies, rather than the subordinate's departures from them, are the act of the government; and, (3) when a subordinate's decision is subject to *review* by the government's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with *their* policies? In Texas, both by state law and local policy and custom, the trustees have the "exclusive power to manage and govern the public free schools of the district." Tex. Educ. Code § 23.26. So who, other than the trustees themselves, in official session, can be a policymaker in Texas? Whatever arguments may be made in the case of a superintendent who serves as the chief executive officer of the district, it is virtually certain that no other employee comes even close to being a policymaker. Such was the thrust of a holding concerning a school principal in the 1989 Fifth Circuit case of *Spann v. Tyler Independent School District.*[7]

Having exhausted the subject of governmental liability, and perhaps the reader as well, let us turn to the more personally critical issue of individual liability. Under what circumstances can personal liability be imposed upon an individual trustee or employee of a school district?

INDIVIDUAL LIABILITY

Governmental entities cannot avoid liability by claiming that the government acted in good faith. *Owen v. City of Independence, Missouri.*[8] If it is determined that a person's rights were violated pursuant to a policy or custom of the entity, including the acts of those identified by the court as being final governmental policymakers, the entity itself is liable. Individuals, however, do have a defense based on good faith from personal liability for damages.

Individual employees can be held personally liable for the damages resulting from their violating the federal constitutional or statutory rights of other persons. Individuals, however, may assert a defense referred to as "qualified good faith immunity." The leading case on this subject is the Supreme Court's decision of *Harlow v. Fitzgerald,*[9] decided in 1982. The Harlow in the case is Bryce N. Harlow, one of the senior officials in the notorious Nixon administration.

The Court noted that qualified or good faith immunity is an affirmative defense that must be pleaded by a governmental official or employee. The heart of the defense is this: ". . . government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." The Court declared that the judge may determine whether the law in question was clearly established at the time the employee acted. If the law at that time was not clearly established, an official cannot reasonably be expected to anticipate subsequent legal developments and cannot fairly be said to "know" that the law forbade conduct not previously identified as unlawful. If the law was clearly established, the immunity defense should fail since a reasonably competent public official should know the law governing his conduct.

Three cases involving Texas school districts will illustrate how the defense can succeed and, occasionally, fail. The first case is *Wells v. Dallas Independent School District,*[10] involving the district's termination of Assistant Superintendent Weldon Wells. The facts of the case are involved, but the critical fact is that "the school district denied Wells pre-termination due process."

Wells sued the school district, members of the Board, and Superintendent Wright. The individual defendants claimed the defense of qualified good faith immunity. The court cited *Harlow* for the proposition that is the law at the time of the termination was not clearly established, the individual defendants could not be held personally liable for Wells' damages. The court concluded that although Wells' rights to pre-termination notice and an opportunity to rebut the charges against him was established prior to Wells' discharge, the good faith affirmative defense had to be granted because at the time in question the law did not *clearly* forbid postponement of notice and hearing until after the termination had been accomplished. In other words, although the right to pre-termination constitutional due process existed at the time, it was not a clear, well-settled right of which a reasonable school administrator or board member should have known. In fact the Superintendent and Board relied on a small army of lawyers who, in turn, relied upon some of the admittedly conflicting precedents in existence at the time for the proposition that adequate post-termination proceedings would "cure" any pre-termination defect. That legal advice turned out to be wrong, however, so the school district, having no good faith immunity defense, could be held liable for the violation. The individuals, however, were granted immunity because the right to pre-termination due process, although in existence, was not "well-settled" at the time of the termination.

It is always interesting to note how the issues involved in qualified good faith immunity claims turn out on down the road. The Supreme Court "finally" resolved the issue of pre-termination due process in its 1985 *Loudermill* decision,[11] by coming up with a compromise. Due process must precede the termination of an employee in mid-contract, but the notice and hearing prior to the termination may be "something less than a full evidentiary hearing," if the full hearing is provided within a reasonable time after the termination.

A second case in which the qualified good faith immunity defense succeeded is *Flores v. Edinburg Consolidated Independent School District,*[12] the famous 1983 case concerning the student who cut his hand in shop class and committed suicide four years later. The family blamed the accident for the eventual suicide. The jury determined the district to be liable for $550,000, an award which subsequently was reversed on appeal. The trial court, however, had found the shop teacher entitled to the defense of qualified good faith immunity.

The trial court noted that the shop teacher's conduct was to be judged in reference to the law existing at the time of the incident. At that time the law regarding § 1983 claims based on negligence was unclear, and the courts were struggling to analyze claims of that nature. The court, therefore, held that given the uncertain state of the law, it could not be said that the teacher reasonably should have known that his action would violate the student's constitutional rights.

The issue in all of this was whether claims of injury due to negligence were actionable under the Fourteenth Amendment in federal court. The Supreme Court finally resolved that issue in two 1986 cases, *Daniels v. Williams*[13] and *Davidson v. Cannon.*[14] In *Daniels*, the plaintiff sued a deputy sheriff alleging that, while an inmate, the plaintiff had slipped on a pillow negligently left on a stairway by the deputy. Plaintiff claimed that the alleged negligence deprived him of a liberty interest without due process in violation of the Fourteenth Amendment. The Supreme Court concluded, "To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries old principle of due process law." Thus, a student's Fourteenth Amendment right to sue for damages based on negligence in maintaining unsafe conditions at school, which the Edinburg shop teacher could not be held to "know" at the time of Flores' accident, ultimately turned out not to exist at all.

The defense of qualified good faith immunity failed in the case of *Jefferson v. Ysleta ISD.*[15] The facts alleged are unfortunate to say the least. Allegedly a teacher tied a second-grader named Jardine to a chair, using a jump rope securing her by the waist and legs. During the first day Jardine was tied to the chair for the entire school day, except for the lunch hour. On the second day she was tied to the chair for protracted periods. While tied, Jardine was denied access to the bathroom. This treatment allegedly was not intended as punishment but, rather, as "an instructional technique." Jardine claimed damages including humiliation, mental anguish, and an impaired ability to study productively.

The teacher raised the defense of qualified good faith immunity, a defense which was rejected by the trial judge. The Fifth Circuit Court of Appeals began its analysis by citing the precedent of *Harlow v. Fitzgerald.* The court noted that the teacher would be immune from personal liability for Jardine's damages unless her alleged conduct, tying Jardine to a chair for nearly two days, violated one or more of Jardine's constitutional or statutory rights of which the teacher reasonably should have been aware. The court stated that in determining what a reasonable teacher should know, it is not necessary to point to a court case which is factually identical with the case in question. It suffices that a reasonable teacher be aware of general, well-developed principles.

The court declared itself persuaded that at the time of the incident a competent teacher should have known that to tie a second-grade student to a chair for an entire school day and for a substantial portion of a second day, as an educational exercise with no suggested justification, was constitutionally impermissible. The court concluded that a young student has a constitutional right not to be lashed to a chair through the school day and denied, among other things, the basic liberty of access to the bathroom when needed. The court found Jardine's constitutional right in the Fifth and Fourteenth amendment rights to substantive due process, specifically her right to be free from bodily restraint.

The *Ysleta* case is significant for several reasons. First, it illustrates the scope of knowledge required of school employees. While a reasonable employee no doubt would ha[illegible] had some inkling that the alleged conduct would be a violation of something or other (common sense comes to mind), it no doubt came as a surprise to the teacher to learn that the alleged conduct constituted a violation of the well established substantive due process rights of the student under the Fourteenth Amendment to the U.S. Constitution.

A second significant aspect of the *Ysleta* case is the fact that the person charged with knowledge of constitutional law is a teacher rather than an administrator. While administrators routinely are hailed into court over constitutional allegations, the *Ysleta* case illustrates the fact that classroom teachers also are charged with knowledge of and adherence to federal constitutional principles.

Qualified good faith immunity is certainly no guarantee against individual liability. It is significant that under *Harlow,* the issue is not what the particular defendant knew about the law but, rather, whether there has been a violation of a well-settled right of which a *reasonable* person would have known. Public school employees frequently are exhorted to keep abreast of the law. That is good advice.

The defense, however, is of value to individuals who are sued. It is often said that the individual is not required to predict the future course of the law, and that is true. The individual school employee or trustee is entitled to escape any personal liability for damages if at the time o[illegible] the action, there was no well-settled principle of law to th[illegible] contrary of which a reasonable person would have known.

THE BIG PICTURE

In the 1980 case *Owen v. City of Independence, Missouri,* the Supreme Court tried to put into perspective the various holdings addressing liability:

> We believe that today's decision, together with prior precedents in this area, properly allocates these costs among the three principals in the scenario of the § 1983 cause of action: the victim of the constitutional deprivation; the officer whose conduct caused the injury; and the public as represented by the municipal entity. The innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole. And the public will be forced to bear only the costs of injury inflicted by the "execution" of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.

In theory, at least, the big picture of federal civil righ[illegible] liability is clear, fair and reasonable. In theory.

[Endnotes to this article appear on page 12]

Probationary Teachers May Be Nonrenewed Without Notice Or Hearing

The school district issued term contracts to its employees and had adopted a policy specifying that a teacher's first two years of employment in the district were probationary. The teacher's contract was not renewed following the 1987-88 school year, her first year of employment by the district. The Commissioner upheld the nonrenewal decision. The "decision not to offer [the probationary teacher] a contract for the following school year require[d] neither notice nor a hearing." Woodrick v. Port Arthur ISD, Dkt. No. 217-R1-688 (Comm'r Educ. Aug. 25, 1989).

Commissioner Dismisses Appeal Over The Renaming Of A School

The school board voted to rename the school from "Phillis Wheatly High School" to "George Washington Brackenridge High School." The matter was appealed. The Commissioner observed that "[t]he naming of a high school campus is a matter completely within the authority conferred by law upon [the] board of trustees. In the absence of a clear abuse of discretion which can be shown to have endangered the safety of students or to otherwise have impaired the educational processes in the district, the board's action will not be disturbed." Those appealing the name change neither alleged sufficient facts to support a decision in their favor nor stated a sufficient basis to grant the relief they sought. The Commissioner dismissed the appeal. National Association for the Advancement of Colored People v. San Antonio ISD, Dkt. No. 6-R8-388 (Comm'r Educ. Aug. 25, 1989).

Nonrenewal Due To RIF Upheld

The reason given for the proposed nonrenewal of the counselor was a reduction in force (RIF) due to a decline in tax revenues. Substantial evidence supported the board's decision not to renew the woman's contract for the 1988-89 school year. From 1982 through 1987, the appraised value of the taxable property in the district had declined 46%. In 1986, the district's tax revenues decreased nearly 25% and its total state and local revenues declined by over 21%. In 1987, tax revenues decreased nearly 19% and state and local revenues again declined by over 21%. The nonrenewal due to RIF was justified since the district was experiencing a financial exigency brought about by declining revenue. Appeal denied. Johnson v. Borden County ISD, Dkt. No. 222-R1-788 (Comm'r Educ. Sept. 11, 1989).

SPECIAL EDUCATION HEARINGS

Hearing Officer Orders The District To Proceed With The Preplacement Evaluation Of A Boy Referred For Special Education Services Without The Parents' Consent

Danny's behavior in 3rd through 5th grades caused a "significant amount of trouble" at his elementary school. During the 1988-89 school year, he was suspended from school on three different occasions and was assigned to an in-school suspension program. Danny's behavioral problems included failing to obey his teachers, interfering with other students, and attempting to assault other students and district staff. Prior to a six day suspension in April of 1989, a referral hearing was held and the boy was determined to be a danger to himself or others. Although Danny had been referred for special education services, Danny's mother refused to consent to a preplacement evaluation of her son. The school district then sought the present hearing to allow it to proceed with the evaluation of Danny without his mother's consent.

The hearing officer observed that the district was responsible for the identification and evaluation of the students eligible for special education services. Danny's mother had been given proper notice concerning all evaluation issues. The hearing officer held that the district was entitled to perform the evaluation with or without the consent of Danny's mother. Lampasas ISD v. Danny R., Dkt. No. 227-SE-589 (Sept. 1989).

[Continued from page 5]

ENDNOTES

1. *NCAA v. Tarkanian,* 109 S.Ct. 454 (1988)
2. *Monell,* 98 S.Ct. 2018 (1978)
3. *Tuttle,* 105 S.Ct. 2427 (1985)
4. *Pembaur,* 106 S.Ct. 1292 (1986)
5. *Praprotnik,* 108 S.Ct. 915 (1988)
6. *Jett,* 109 S.Ct. 2702 (1989)
7. *Spann,* F.2d (5th Cir. 1989), not yet reported
8. *Owen,* 100 S.Ct. 1398 (1980)
9. *Harlow,* 102 S.Ct. 2727 (1982)
10. *Wells,* 576 F.Supp. 497 (N.D. Tex. 1983), *rev'd on other grounds,* 793 F.2d 679 (5th Cir. 1986)
11. *Cleveland Board of Education v. Loudermill,* 105 S.Ct. 1487 (1985)
12. *Flores,* 554 F.Supp. 974 (S.D. Tex. 1983), *rev'd on other grounds,* 741 F.2d 773 (5th Cir. 1984)
13. *Daniels,* 106 S.Ct. 662 (1986)
14. *Davidson,* 106 S.Ct. 668 (1986)
15. *Ysleta,* 817 F.2d 303 (5th Cir. 1987)

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COMMENTARY

CHILD ABUSE AND NEGLECT: IMPLICATIONS FOR EDUCATORS *

by

RICHARD G. SALMON, PH.D.

AND

M. DAVID ALEXANDER, ED.D. **

Introduction

Both by tradition and law, parents or guardians have legal custody of their children and enjoy the legal presumption that parental love and concern will provide their children with all necessary care and protection.[1] Only when evidence is presented that parents or guardians are not caring for and protecting their children in accordance with societal expectations will the state intervene.[2] The state obtains its power to intercede on behalf of children through the doctrine of *parens patriae* and acts as guardian of children within its jurisdiction.[3] According to Alexander and Alexander,

> . . . the common law doctrine of *parens patriae*, which maintains, essentially, that as a father to all persons, the state has the inherent prerogative to provide for the commonwealth and individual welfare. It can through the exercise of the police power of the legislature establish reasonable laws, not repugnant to the constitution, as it may judge for the good of the state. As guardian over everyone, the state has the authority to protect those who are not legally competent to act in their own behalf. . . . This protection was quite naturally interpreted to apply to minor children who, because of their age, were unable to take care of themselves.[4]

---

* The views expressed are those of the author and do not necessarily reflect the views of the publisher.

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[1] Katz, Sanford N., Lillian Ambrosino, Melba McGrath, and Kitt Sawitsky, "Legal Research on Child Abuse and Neglect: Past and Future," *Family Law Quarterly*, Vol. XI: No. 2, Summer, 1977, p. 151.

[2] Id.

[3] Schwartz, Arthur and Harold Hirsh, "Child Abuse and Neglect: A Survey of the Law," *Medical Trial Technique Quarterly*, Vol. 28, Winter, 1982, pp. 294-295.

[4] Alexander, Kern and David Alexander, *American Public School Law*, 2nd Ed. St. Paul, Minnesota: West Publishing Company, 1985, p. 216.

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The alleged incidents of sexual abuse occurred over a four-year period from 1967 to 1971, some 12 to 16 years prior to conduct of a hearing. Olson, a former student of Fisher, complained that once or twice a month during the four-year period he was called to Fisher's office where the sexual contact occurred. Olson maintained that he brought charges against Fisher at this late date out of concern for his own children and those of others. After an investigation by the police and recommendation from an independent hearing examiner to discharge Fisher, the school board decided to seek immediate dismissal. Fisher offered to resign without admitting his guilt but the school board refused his resignation and adopted a resolution approving his immediate discharge. This decision was affirmed by the Minnesota Court of Appeals.[10]

- Oklahoma—Wheeler, an Oklahoma school district superintendent, during a state of alcoholic intoxication, spanked and beat Holman, a ten-year-old student for scuffling with another student. It was alleged that Wheeler used unnecessary and excessive force and the child reacted by crying. Wheeler then ordered Holman to cease crying or he would strike Holman between the eyes with the paddle. Action was brought against Wheeler who demurred to petition on grounds that he was immune under the Oklahoma Torts Claim Act. The lower court granted the demurrer but the Oklahoma Supreme Court reversed. The supreme court said that Wheeler had acted in a willful and wanton manner which placed him outside the scope of the Oklahoma Torts Claim Act.[11]

Legislative Responses

Definition and Purpose

While the phenomena of child abuse and neglect are not recent societal occurrences, only recently have they been given national attention.[12] Commencing in 1962, state legislatures began enacting legislation designed to deal with problems of child abuse and neglect, and in 1974 a federal statute, the Child Abuse Prevention and Treatment Act, was enacted.[13] The purpose of this legislation was to provide federal financial assistance to the states that had implemented programs for identification, prevention, and treatment of instances of child abuse and neglect.[14] Currently, all 50 states plus the District of Columbia, Puerto Rico, and the Virgin Islands have enacted various forms of child abuse constitutes child abuse and neglect, while other states have not attempted to distinguish between them.[23] In a recent survey of state child abuse statutes, child abuse and neglect were defined as follows:

---

[10] *Fisher v. Independent School District No. 622*, 357 N.W.2d 152, 21 Ed.Law 294 (1984).

[11] *Holman by and through Holman v. Wheeler*, 677 P.2d 645, 16 Ed.Law 658 (1983).

[12] Freiman, Marjorie R., "Unequal and Inadequate Protection Under the Law: State Child Abuse Statutes," *George Washington Law Review*, Vol. 50, No. 2, January, 1982, pp. 243–244.

[13] Id. at p. 252.

[14] Public Law 93-247, 88 Stat. 4 (1974) [codified as amended at 42 U.S.C. § 5101–5107 (1975 & Supp. IV 1980)]

> Implicit in most definitions of abuse is that the injury is deliberately inflicted. Abuse includes bodily violence (beating, squeezing, poisoning, burning, cutting, and exposing to heat or cold); sexual molestation (ranging from inappropriate fondling to intercourse); and psychological or mental injury (insults and accusations, prevention of sleep, and sensory overload relating to light, sound, pain, itching, stench, and aversive taste).
>
> Neglect is generally an omission—a failure to provide for a child's physical or emotional needs or both. Neglect includes deprivation of physiological necessities such as drink, nourishment, clothing, shelter, and sanitation. In addition, neglect encompasses the failure to fulfill psychological needs for sensory stimulation and social communication. These parental failures do not amount to neglect, however, if they are beyond the parents' control.[24]

Reporting Child Abuse and Neglect

An integral component of state child abuse and neglect statutes is the mandated reporting of suspected instances of child abuse and neglect by certain professionals. During initial legislation, child abuse and neglect legislation required only physicians to report instances of suspected child abuse and neglect.[25] Currently, in addition to medical personnel such as nurses, surgeons, medical examiners or coroners, dentists, osteopaths, optometrists, chiropractors, and podiatrists, other professionals including school teachers and officials, police, peace or law enforcement officers, social workers, and day-care personnel often are required to report instances of child abuse and neglect.[26] Forty-nine states have mandated that teachers report to certain authorities suspected instances of child abuse and neglect.[27] Vermont is the only state that does not require teachers to report suspected instances of child abuse and neglect but does include teachers in a category of permissible reporters.[28]

Legislation requiring the reporting of child abuse and neglect by certain "professionals" has resulted in significantly increasing the number of cases reported to the authorities.[29] For example, since New York enacted mandatory reporting, the number of cases reported by the professional groups increased from 3% to 44% of total cases reported.[30] Unfortunately, despite ample opportunity to observe and monitor their students in a continuing consistent manner, teachers have been particu-

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[23] Schwartz, et al., supra at 298–302.

[24] Id., at 247.

[25] Aaron, Jody, "Civil Liability for Teachers' Negligent Failure to Report Suspected Child Abuse," *Wayne Law Review*, Vol. 28, 1981, p. 187.

[26] Katz, supra at 161.

[27] Freiman, supra at 259 (footnote).

[28] Id.

[29] Aaron, supra at 189–190.

[30] Schwartz, et al., supra at 304.

[illegible]

A 1985 Oregon case, *McDonald v. CSD*[38] serves to illustrate the statutory immunity granted reporters of child abuse and neglect. In this case, a teacher observed scratches on the neck of one of her pupils and had him examined by a child development specialist. When questioned about how he had acquired the scratches, the child told two stories. One version attributed the scratches to his kitten, and the second version suggested that the child's mother had made the scratches by choking him, as the child said she had done on several occasions. The principal was informed, who in turn instructed the child development specialist to report the incident to the state's Children's Services Division. The child was removed from parental custody and placed in a foster home. Subsequently, the parents appeared in court where the allegations of child abuse were ruled groundless and the child reinstated with his parents. The parents brought suit against Children's Services Division, principal, teacher, and others. The court dismissed the parents' complaint and indicated regardless that two versions of the derivation of scratches were told and that the principal relied only upon the opinion of the child development specialist, both the principal and teacher had acted in good faith and had reasonable grounds to report suspected child abuse.

Penalty for Failure to Report

In order to gain compliance from those persons required to report instances of child abuse and neglect, most states permit the assessment of penalties for knowing and willful failure to report.[39] Most states have enacted criminal penalties for those persons guilty of not reporting suspected cases of child abuse and neglect.[40] Some states have legislated both criminal and civil penalties, and a few states provide only for civil remedies.[41]

Those states that have established criminal penalties for persons found guilty of not reporting instances of child abuse and neglect commonly classify such an offense as a misdemeanor.[42] Punishments normally include fines up to $1,000, jail sentences up to one year, or both.[43]

As discussed previously, the threat of criminal prosecution, possibly due to inaction by persons responsible for initiating criminal proceedings, has not resulted in high level of reporting compliance by teachers. As a result, some interest is being given to initiation of civil suits against teachers for their failure to report instances of child abuse and neglect. According to Aaron,

> The continued incidence of child abuse and the reluctance of teachers to report suggests a need for immediate modification of existing reporting schemes. Imposition of civil liability for any negligent

---

[38] 71 Or.App. 751, 694 P.2d 569, 22 Ed.Law 1001 (1985).

[39] Freiman, supra at 263.

[40] Id.

[41] Id.

[42] Schwartz, supra at 311.

[43] Id.

occurred. A defendant teacher need only to defeat one of the four elements in order to eliminate a charge of negligence.

Corporal Punishment and Child Abuse

The right of teachers to discipline school children for the purpose of maintaining order and decorum in the schools has been well documented.[54] Under the in loco parentis doctrine, teachers usually have the power to physically punish school children in order to maintain discipline.[55] The use of physical punishment dates back to the colonial days of our nation.[56] The majority of the states have enacted statutes that permit use of corporal punishment by teachers, or reasonable corporal punishment has been sanctioned through court decisions under the doctrine of *in loco parentis.*[57] Six states, however, including New York, New Jersey, Massachusetts, Maine, Hawaii, and Vermont now ban use of corporal punishment in the public schools.[58]

There is an apparent trend that questions whether teachers should be allowed to administer corporal punishment in the public schools. Many educators have questioned both the efficacy and equity of permitting continued use of corporal punishment by teachers. In 1977, the United States Supreme Court, in *Ingraham v. Wright*[59] was asked to determine whether use of corporal punishment by public school teachers was violative of the "cruel and unusual punishment" clause of the Eighth Amendment of the United States Constitution. The court also was requested to rule whether the due process clause of the Fourteenth Amendment requires prior notice and an opportunity to be heard. The court ruled that neither the Eighth nor the Fourteenth Amendment was violated by use of corporal punishment. The Eighth Amendment was intended to protect prisoners of the penal system, not public school children. The court also reasoned that the schools were open to public scrutiny and had not abused the use of corporal punishment. Consequently, there was no need to invoke the due process procedures of the Fourteenth Amendment prior to administration of corporal punishment.

Nevertheless, those persons unhappy with the use of corporal punishment by teachers continue to seek legal solutions that would eliminate use of physical punishment in the public schools. In some states, parents are seeking through personal legal action to have the teachers removed from the classroom or punished through use of the child abuse and neglect statutes of the state. In other instances parents are from either criminal or civil liability for those persons who in good faith erroneously report instances of child abuse and neglect.

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[54] Schwartz, supra at 328.

[55] Alexander, et al., supra at 292.

[56] Id.

[57] Id.

[58] New York and Hawaii have banned use of corporal punishment by public schools through state board of education policies. New Jersey, Massachusetts, Maine, and Vermont have banned use of corporal punishment through state legislation. See: New Jersey Statutes Annotated, 18A:6–1; Massachusetts Statutes, Chapter 71 § 37G; Maine Resolutions and Statutes Annotated, Title 17A § 106(2); and Vermont Statutes Annotated, Title 16, Chapter 25, Subchapter 4 § 1161a.

[59] 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977).

A related issue to child abuse and neglect centers upon the legislation and litigation concerning use of corporal punishment by the public schools. Several states have banned use of corporal punishment by the public school personnel either through legislation or state school board regulations. In a few instances, opponents of corporal punishment, through applications of child abuse and neglect statutes, have attempted to eliminate the practice of corporal punishment in the public schools.

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SUPERIOR COURT OF
NEW JERSEY
LAW DIVISION
MIDDLESEX COUNTY

DOCKET NO. L-0823-91

v.

Civil Action

AMENDED COMPLAINT AND
JURY DEMAND AND
DESIGNATION OF TRIAL
COUNSEL

are unknown),

Defendants.

The Plaintiffs, Ga an infant, by her Guardian Ad Litem, individually, individually, residing at S the Township of , State of New Jersey, by way of Amended Complaint, say:

COUNT ONE

1. The Defendant, , resides at

New Jersey.

2. The Defendant, G Community Center, Inc., is a New Jersey corporation, having its principal place of

business at 4

State of New Jersey.

3. The Defendant, Township of Board of Education, is a New Jersey corporation having its principal place of business at Township of , State of New Jersey.

4. The Defendant, r Elementary School, is a public school owned, operated and controlled by the Defendant, Township of I Board of Education, and is located on -esex, State of New Jersey.

5. The Defendant, s a corporation doing business in the State of New Jersey, having its principal place of business at 5

State of New Jersey.

6. On or about November 20, 1990, the Defendant, a volunteer and/or an employee working in the SEAS Program run by and/or through the Township of Board of Education, ~~Center, Inc.~~ and the P.

7. On the aforementioned date, the Defendant, did maliciously and intentionally sexually assault the Plaintiff, while at the G pool in the City of

8. As a result of said sexual assault, the Plaintiff, was seriously and permanently, physically and psychologically injured, was prevented from attending to her

normal affairs, was compelled to undergo great expense in procuring medical services and supplies as a result of said injuries, was permanently impaired and will be compelled to expend further sums of money in endeavoring to affect a cure or relief for her said injuries.

WHEREFORE, the Plaintiffs, [redacted], demand judgment against the Defendants for compensatory damages, punitive damages, interest, attorney's fees and costs of suit.

COUNT TWO

1. The Plaintiffs, [redacted] repeat and reiterate the allegations, contained in Count One as though set forth herein in their entirety.

2. On the above described date, the Defendant, [redacted] negligently sexually assaulted the Plaintiff, [redacted]

3. As a result of said sexual assault, the Plaintiff, [redacted] was seriously and permanently, physically and psychologically injured, was prevented from attending to her normal affairs, was compelled to undergo great expense in procuring medical services and supplies as a result of said injuries, was permanently impaired and will be compelled to expend further sums of money in endeavoring to affect a cure or relief for her said injuries.

WHEREFORE, the Plaintiffs, [redacted] demand judgment against the Defendants for compensatory damages, punitive damages, interest, attorney's fees and costs of suit.

COUNT THREE

1. Plaintiffs, [redacted] repeat and reiterate the allegations contained in Counts One and Two as though set forth herein in their entirety.

2. On the above described date, the Defendant, [redacted] intentionally committed an act of assault and battery upon the Plaintiff, [redacted]

3. As a result of said assault and battery, the Plaintiff, [redacted] was seriously and permanently, physically and psychologically injured, was prevented from attending to her normal affairs, was compelled to undergo great expense in procuring medical services and supplies as a result of said injuries, was permanently impaired and will be compelled to expend further sums of money in endeavoring to affect a cure or relief for her said injuries.

WHEREFORE, the Plaintiffs, [redacted] demand judgment against the Defendants for compensatory damages, punitive damages, interest, attorney's fees and costs of suit.

COUNT FOUR

1. Plaintiffs, [redacted] repeat and reiterate the allegations contained in Counts One through Three as though set forth herein in their entirety.

2. On the above described date, the Defendant, [redacted]

Carabillo, negligently committed an act of assault and battery upon the Plaintiff,

3. As a result of said assault and battery, the Plaintiff, , was seriously and permanently, physically and psychologically injured, was prevented from attending to her normal affairs, was compelled to undergo great expense in procuring medical services and supplies as a result of said injuries, was permanently impaired and will be compelled to expend further sums of money in endeavoring to affect a cure or relief for her said injuries.

WHEREFORE, the Plaintiffs, demand judgment against the Defendants for compensatory damages, punitive damages, interest, attorney's fees and costs of suit.

COUNT FIVE

1. Plaintiffs, repeat and reiterate the allegations contained in Counts One through Four as though set forth herein in their entirety.

2. On the above described date, the Defendant, intentionally committed an act of offensive touching upon the Plaintiff,

3. As a result of said offensive touching, the Plaintiff, was seriously and permanently, physically and psychologically injured, was prevented from attending to her normal affairs, was compelled to undergo great expense in procuring medical services and supplies as a result of said injuries, was permanently impaired and will be compelled to

expend further sums of money in endeavoring to affect a cure or relief for her said injuries.

WHEREFORE, the Plaintiffs, demand judgment against the Defendants for compensatory damages, punitive damages, interest, attorney's fees and costs of suit.

COUNT SIX

1. Plaintiffs, repeat and reiterate the allegations contained in Counts One through Five as though set forth herein in their entirety.

2. On the above described date, the Defendant, negligently committed an act of offensive touching upon the Plaintiff,

3. As a result of said negligent offensive touching, the Plaintiff, was seriously and permanently, physically and psychologically injured, was prevented from attending to her normal affairs, was compelled to undergo great expense in procuring medical services and supplies as a result of said injuries, was permanently impaired and will be compelled to expend further sums of money in endeavoring to affect a cure or relief for her said injuries.

WHEREFORE, the Plaintiffs, demand judgment against the Defendants for compensatory damages, punitive damages, interest, attorney's fees and costs of suit.

COUNT SEVEN

1. Plaintiffs, repeat and reiterate the allegations contained in Counts One through Six as though set forth herein in their entirety.

2. On the above described date, the Defendants were acting in a supervisory, disciplinary or guardianship capacity over the Plaintiff, , and otherwise acted with a fiduciary responsibility to ensure the safety and well-being of the Plaintiff,

3. The Defendants breached their fiduciary responsibilities to the Plaintiff, by and through their actions and/or inactions.

4. As a result of said actions, the Plaintiff, was seriously and permanently, physically and psychologically injured, was prevented from attending to her normal affairs, was compelled to undergo great expense in procuring medical services and supplies as a result of said injuries, was permanently impaired and will be compelled to expend further sums of money in endeavoring to affect a cure or relief for her said injuries.

WHEREFORE, the Plaintiffs, demand judgment against the Defendants for compensatory damages, punitive damages, interest, attorney's fees and costs of suit.

COUNT EIGHT

1. Plaintiffs, , repeat and reiterate the allegations contained

in Counts One through Seven as though set forth herein in their entirety.

2. The Defendants, Community Center, Inc., Township of Board of Education, School, John Does 1-20 (fictitious names, whose identities are unknown) and ABC Corporations 1-20 (fictitious names, whose identities are unknown), had a duty to supervise the SEAS Program, its participants, and all employees/volunteers working in the program, including the Defendant,

3. The Defendants, Community Center, Inc., Township of Board of Education, School, , John Does 1-20 (fictitious names, whose identities are unknown) and ABC Corporations 1-20 (fictitious names, whose identities are unknown), negligently, carelessly and/or recklessly failed to carry out this duty, or inadequately carried out this duty, and otherwise failed to properly supervise the program and the employee/volunteers chosen to participate in this program.

4. As a result of the above actions or omissions committed by the Defendants, the Plaintiff, was seriously and permanently, physically and psychologically injured, was prevented from attending to her normal affairs, was compelled to undergo great expense in procuring medical services and supplies as a result of said injuries, was permanently impaired and will be compelled to expend further sums of money in endeavoring to effect a cure or relief for said injuries.

WHEREFORE, the Plaintiffs, [redacted], demand judgment against the Defendants for compensatory damages, punitive damages, interest, attorney's fees and costs of suit.

COUNT NINE

1. The Plaintiffs, [redacted], repeat and reiterate the allegations contained in Counts One through Eight as though set forth herein in their entirety.

2. The Defendants, [redacted] Community Center, Inc., Township of [redacted] Board of Education, [redacted] School, [redacted], John Does 1-20 (fictitious names, whose identities are unknown) and ABC Corporations 1-20 (fictitious names, whose identities are unknown), had a duty to the Plaintiff to screen, interview and otherwise investigate all of the volunteers/employees who they accepted for participation in the SEAS Program.

3. The Defendants, [redacted] Community Center, Inc., Township of [redacted] Board of Education, [redacted] School, [redacted] John Does 1-20 (fictitious names, whose identities are unknown) and ABC Corporations 1-20 (fictitious names, whose identities are unknown), negligently, carelessly and/or recklessly screened the volunteers/employees whom they accepted for participation in the SEAS Program and thus breached their duty to protect the Plaintiff, Catherine Phillips, from individuals who would, or potentially could, injure her.

4. As a result of the acts and/or omissions of the Defendants, the Plaintiff, [redacted] was seriously and

permanently, physically and psychologically injured, was prevented from attending to her normal affairs, was compelled to undergo great expense in procuring medical services and supplies as a result of said injuries, was permanently impaired and will be compelled to expend further sums of money in endeavoring to affect a cure or relief for her said injuries.

WHEREFORE, the Plaintiffs, [redacted] demand judgment against the Defendants in the form of compensatory damages and punitive damages for such sum as would reasonably and properly compensate them in accordance with the laws of the State of New Jersey, together with interest, attorney's fees and costs of suit.

COUNT TEN

1. The Plaintiffs, [redacted], repeat and reiterate the allegations contained in Counts One through Nine as though set forth herein in their entirety.

2. As a result of the acts committed by the Defendants, the Plaintiff, [redacted] has been caused to suffer great emotional distress.

WHEREFORE Plaintiffs, [redacted] demand judgment against the Defendants, in the form of compensatory and punitive damages for such sum as will reasonably and properly compensate them in accordance with the laws of the State of New Jersey, together with interest, attorney's fees and costs of suit.

COUNT ELEVEN

1. The Plaintiffs, , repeat and reiterate the allegations contained in Counts One through Ten as though set forth herein in their entirety.

2. The Plaintiffs, are the father and mother of the injured infant Plaintiff,

3. As a direct and proximate result of the aforesaid injuries to the Plaintiff, , caused by the Defendants, the Plaintiffs, have been and will be in the future deprived of the love, companionship, consortium and services of the said injured Plaintiff,

WHEREFORE, the Plaintiffs, demand judgment against the Defendants in the form of compensatory damages and punitive damages for such sum as would reasonably and properly compensate them in accordance with the laws of the State of New Jersey, together with interest, attorney's fees and costs of suit.

COUNT TWELVE

1. The Plaintiffs, C , repeat and reiterate the allegations contained in Counts One through Eleven as though set forth herein in their entirety.

2. As a result of the acts committed by the Defendants, the Plaintiffs, Jc were caused to suffer great emotional distress because of the

injuries suffered by the infant Plaintiff,

WHEREFORE Plaintiffs,

demand judgment against the Defendants in the form of compensatory and punitive damages for such sum as will reasonably and properly compensate them in accordance with the laws of the State of New Jersey, together with interest, attorney's fees and costs of suit.

JURY DEMAND

The Plaintiffs hereby demand a trial by jury as to all issues.

DESIGNATION OF TRIAL COUNSEL

The Plaintiffs hereby designate Ronald J. Busch as trial counsel in the within matter.

DATED: August 13, 1991

CERTIFICATION

Plaintiffs hereby certify that there are no other actions or arbitration proceedings now pendin ed
and there are no other time.

iffs

DATED: August 13, 1991

Cert. den 107 L Ed 2d 835 (1990)

KATHLEEN STONEKING v. BRADFORD AREA SCHOOL DISTRICT, FREDERICK SMITH, in his individual and official capacity as principal of the Bradford Area High School; RICHARD MILLER, in his individual and official capacity as assistant principal of the Bradford Area High School; and FREDERICK SHUEY, in his individual and official capacity as Superintendent of the Bradford Area School District. Frederick Smith, Richard Miller, and Frederick Shuey, Appellants

No. 87-3637

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

882 F.2d 720; 1989 U.S. App. LEXIS 15771

February 3, 1988, Argued September 12, 1988, Decided
August 16, 1989, Filed

SUBSEQUENT HISTORY: Rehearing Denied September 12, 1989.

PRIOR HISTORY: [**1]

On Appeal from the United States District Court for the Western District of Pennsylvania (ERIE) (D.C. Civil No. 87-00063 E).

COUNSEL: Kenneth D. Chestek (Argued), Murphy, Taylor & Adams, P.C. Erie, Pennsylvania, James D. McDonald, Jr., McDonald Law Group, Erie, Pennsylvania, Attorneys for Appellants.

Wallace J. Knox, Sean J. McLaughlin, Richard A. Lanzillo, Knox McLaughlin Gornall & Sennett, P.C., Erie, Pennsylvania, Deborah W. Babcox (Argued), Pecora Duke & Babcox, Bradford, Pennsylvania, Attorneys for Appellee.

JUDGES: Sloviter, Stapleton, and Mansmann, Circuit Judges

OPINIONBY: SLOVITER

OPINION: [*721]

OPINION OF THE COURT

SLOVITER, Circuit Judge.

This case is before us on remand from the United States Supreme Court which vacated our judgment and remanded for further consideration in light of DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989). This case was originally heard on the appeal of the individual defendants from the denial by the district court of their motion for summary judgment on the grounds of qualified immunity. We affirmed, rejecting [illegible] defendants' contention that they were not alleged to have violated plaintiff's clearly established right. Stoneking v. [**2] Bradford Area School Dist., 856 F.2d 594 (3d Cir. 1988) (Stoneking I), vacated sub nom. Smith v. Stoneking, 489 U.S. 1062, 109 S. Ct. 1333, 103 L. Ed. 2d 804 (1989). It is now incumbent upon us to reconsider that decision. n1

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n1 Appellants argue that the fact that the Supreme Court has remanded this case for reconsideration in light of DeShaney "strongly suggest[s]" that DeShaney is indistinguishable and controls the outcome of this case. Appellants' Supplemental Brief on Remand at 8. We know of no authority for the proposition that a direction that we give "further consideration" to a case is in effect a direction as to the outcome. If the Supreme Court wished to direct an outcome, we are confident that it would have so stated.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*722] I.

Kathleen Stoneking filed suit under 42 U.S.C. @ 1983 against the Bradford Area School District, Frederick Smith, the principal of the Bradford Area High School, Richard Miller, the assistant principal, and Frederick Shuey, the superintendent of the School District. Each of the individual defendants was sued in both his individual and official capacity. Stoneking prayed for relief in the form of compensatory and punitive damages against Shuey, Smith, Miller and the [**3] School District.

Stoneking's complaint alleged that Edward Wright, a School District employ who was the Band Director at Bradford High, used physical force, threats of reprisal, intimidation and coercion to sexually abuse and harass her and to force her to engage in various sexual acts beginning October 1980, when she was a high school student, and continuing through Stoneking's sophomore, junior and senior years until her graduation in 1983 and thereafter until 1985. Defendants concede that some of these acts occurred in the band room at the high school and on trips for band functions, as well as in Wright's car and in his house while Stoneking baby-sat or after he gave her a music lesson. Wright was ultimately prosecuted for various sex-related crimes and pled guilty.

Stoneking averred that in 1979, before Wright's actions toward her, another female member of the band informed Smith that Wright had attempted to rape or sexually assault her; that Smith, in his capacity as principal, maintained a personal file on Wright which contained reports of complaints of sexual misconduct by female students in the band program; that Smith announced to Wright a "policy" with respect to his contact [**4] with female students under which he was to have no further "one on one" contacts with female band members; that Smith, Miller and Shuey "failed to take any action to protect the health, safety and welfare of the female student body" and Stoneking, App. at 10; that Miller and Shuey were also on notice of the complaints of sexual misconduct by Wright and of the policy adopted by Smith under which Wright was to have no one-on-one conduct with female band members, or, if Shuey was not aware, it was because of "the defective and deficient policies and customs" of the School District, App. at 11; and that Wright threatened his victims that i they reported his actions they would incur "loss of parental support, the est of friends and the dissolution of the school band which had become . . . a significant institution to the School District and the community in general," App. at 12.

After discovery in this case and in cases filed by other students who alleged they were also sexually abused by Wright, defendants moved for summary judgment in the actions against them in their individual capacities on the basis of qualified immunity. As we explained in our earlier opinion, defendants contended [**5] that "no clearly settled law existed, either at the time of the incidents complained of in the plaintiff's Complaint or as of the present time, which would cause a reasonable person to know either of the constitutional right which allegedly has been violated or that the alleged acts or failure to act on the part of the individual defendants would lead to a violation of that constitutional right." See 856 F.2d at 596.

The district court denied the defendants' motion for summary judgment, holding that there was evidence from which a jury could conclude that defendants were reckless in their handling of an incident of abuse which had been reported to Smith in 1979, in their failure to investigate other reported incidents involving Wright and other female students, and in their attempts to remedy and/or rectify the problems involving Wright. Stoneking v. Bradford Area School Dist., 667 F.Supp. 1088, 1098 (W.D. Pa. 1987).

[*723] On appeal, defendants argued that they were entitled to qualified immunity because they had no clearly established duty to protect Stoneking, and therefore there was no basis upon which a violation of 42 U.S.C. @ 1983 could be predicated. We rejected that contention, [**6] holding that under the applicable state law a special relationship arose between the school officials and students entrusted to their care, and that the Pennsylvania child abuse reporting and in loco parentis statutes, coupled with the broad common law duty [illegible] officials to students, evidenced a desire on the part of the state to provide affirmative protection to students. 856 F.2d at 603. Defendants now argue that the Supreme Court's decision in DeShaney controls our decision and mandates a holding that the school authorities owed no constitutional duty of protection to Stoneking.

In DeShaney, the Court held that a minor could not maintain an action against Winnebago County, its Department of Social Services, and various individual employees of the Department for injuries he received at the hands of his father, even though the county caseworker returned DeShaney to the father's custody and allegedly knew or should have known of the risk of violence to him at his father's hands. The Court's analysis was straightforward: it held that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." 109 [**7] S.Ct. at 1004. It rejected the analysis adopted by, inter alia, this court in Estate of Bailey by Oare v. County of York, 768 F.2d 503, 510-11 (3d Cir. 1985), that under similar circumstances a "special relationship" arose between the state and the child which imposed an affirmative constitutional duty to provide adequate protection.

The Court held that because there was no constitutional duty on the state to provide its citizens with particular protective services, "the State cannot be held liable under the [Due Process] Clause for injuries that could have been averted had it chosen to provide them." 109 S.Ct. 1004 (footnote omitted). It distinguished DeShaney's situation from those "limited circumstances [in which] [illegible] Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." 109 S.Ct. at 1004-05. It stated that prior cases stood only for the proposition that, "when the State takes a person into its custody and holds him there against his will, the

Constitution imposes upon it a corresponding duty to assume some responsibili for his safety and general well-being," 109 S.Ct. at 1005-06 (citing Youngberg [**8] v. Romeo, 457 U.S. 307, 317, 73 L. Ed. 2d 28, 102 S. Ct. 2452 (1982) (state must provide involuntarily committed mental patients with services necessary to insure their reasonable safety), and Estelle v. Gamble, 429 U.S. 97, 103-04, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976) (prison authorities must treat medical needs of an inmate)).

In light of the Supreme Court's discussion in DeShaney distinguishing between affirmative duties of care and protection imposed by a state on its agents and constitutional duties to protect, we can no longer rely on the statutory and common law duties imposed in Pennsylvania on school officials as the basis of a duty to protect students from harm occurring as a result of a third person.

Arguably, our earlier discussion noting that "students are in what may be viewed as functional custody of the school authorities" during their presence at school because they are required to attend under Pennsylvania law, see 856 F.2d at 601 (citing 24 Pa. Stat. Ann. @ 13-1327 (Purdon Supp. 1988)), is not inconsistent with the DeShaney opinion. In DeShaney, the Court stated that "[h]ad the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its [**9] agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect." 109 S.Ct. at 1006 n.9. The Court then explicitly referred to court of appeals cases holding, by analogy to Estelle and Youngberg, "that the State may be held liable under the Due Process Clause for failing to protect children in foster homes from mistreatment at the hands of their [*724] foster parents," but expressed no view on the validity of this analogy. Id. (citing Doe v. New York City Dept. of Social Services, 649 F.2d 134, 141-42 (2d Cir. 1981); Taylor ex rel. Walker v. Ledbetter, 818 F.2d 791, 794-97 (11th Cir. 1987) (en banc), cert. denied, 109 S. Ct. 1337, 103 L. Ed. 2d 808 (1989)).

The situation of school children, compelled by state law to attend school, who are physically mistreated by School District employees, may not be dissimilar to that of children in foster homes mistreated by their foster parents. However, we prefer not to rest our decision again on an affirmative duty to protect such students in this situation because the uncertainty of the law in this respect may cause further delay. We are advised that the trial of [**10] this case against the School District and the defendants in their official capacities has been held up during the pendency of the appeal by defendants on the denial of their motion for summary judgment on the claims against them in their individual capacities. Therefore, we believe it is more expedient to decide whether plaintiff's claim before us would withstand summary judgment even if we could not rely on the special relationship which the Supreme Court's footnote in DeShaney may still leave as a viable basis for liability.

II.

The principal distinction between DeShaney's situation and that of Stoneking is that DeShaney's injuries resulted at the hands of a private actor, whereas Stoneking's resulted from the actions of a state employee. The significance of the status of the perpetrator as a private actor rather than as a state offic is referred to on numerous occasions in the DeShaney opinion. Not only is the Court's statement of the holding in terms of the identity of the actor ("a State's failure to protect an individual against private violence simply does t constitute a violation of the Due Process Clause," id. at 1004), but the analytic steps taken by [**11] the Court to reach that holding continuously take note of the status of the person responsible for the injuries. See, e.g., "nothing in the language of the Due Process Clause itself requires the state to protect the life, liberty and property of its citizens against invasion by private actors;" the Due Process Clause "forbids the State itself to deprive individuals of life, liberty or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to insure that those interests do not come to harm through other means;" the purpose of the Due Process Clause "was to protect the people from the State, not to insure that the State protected them from each other." 109 S.Ct. at 1003 (emphasis added).

Unlike DeShaney's father, who was referred to throughout the DeShaney opinion as a private third party, Wright was a school district employee subject to defendants' immediate control. In fact, many of Wright's interactions with Stoneking occurred in the course of his performance of his official responsibilities, such as during school-sponsored events and trips, and sometimes on school property. [**12]

It is immaterial for this purpose whether Wright's sexual abuse is viewed as attributable to the state. This consideration would be relevant had Stoneking sued Wright under section 1983, alleging that he acted under color of state law. She did not. Instead, the suit is against the School District and its supervisory officials, and they were incontestably acting under color of state w.

Defendants argue that Stoneking's emphasis on the fact that Wright was an agent and employee of the school district is merely an assertion of "supervisory liability", or respondeat superior, which cannot be a basis of liability. See Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 691, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978). However, this is not a case in which Stoneking alleges that defendants are vicariously liable because of Wright's actions. Instead, she argues defendants are liable because of their own actions in adopting and maintaining a practice, custom or policy of reckless indifference to [*725] instances of known or suspected sexual abuse of students by teachers, in concealing complaints of abuse, and in discouraging students' complaints about such conduct. She argues that these practices, customs or policies [**13] created a climate which, at a minimum, facilitated sexual abuse of students by teachers in general, and that there was a causal relationship between these practices, customs or policies and the repeated sexual assaults against her by Wright. Thus, this is not respondeat superior in another guise, but an assertion of liability against the individual defendants based on theories recognized in a line of Supreme Court cases.

Nothing in DeShaney suggests that state officials may escape liability arising from their policies maintained in deliberate indifference to actions taken by their subordinates. As the Supreme Court recently reconfirmed in City of Canton v. Harris, 489 U.S. 378, 109 S. Ct. 1197, 1205, 103 L. Ed. 2d 412 (1989), a municipality may be liable under section 1983 where its policymakers made "a deliberate choice to follow a course of action . . . from among various ernatives," (quoting Pembauer v. Cincinnati, 475 U.S. 469, 483-84, 89 L. Ed. 452, 106 S. Ct. 1292 (1986) (plurality op.)), and the policy chosen "reflects deliberate indifference to the constitutional rights of [the city's] inhabitants," 109 S.Ct. at 1206. See also Monell, 436 U.S. at 690-91

(1978)(government body may be sued for constitutional deprivations [**14] visited pursuant to governmental "custom", "practices" or "usage").

This is an independent basis for liability previously pled and preserved by Stoneking which is unrelated to the issue decided in DeShaney. Liability of municipal policymakers for policies or customs chosen or recklessly maintained is not dependent upon the existence of a "special relationship" between the municipal officials and the individuals harmed. See Bordonaro v. McLeod, 871 F.2d 1151 (1st Cir. 1989), petition for cert. filed, 57 U.S.L.W. 3843 (U.S. June 18, 1989) (No. 88-2036) (liability against police chief and mayor for unauthorized action of police officers in forcing entry into bar and beating patrons based on the police officials' constructive knowledge of custom and deficient policies in recruitment and training).

Thus, to the extent that the Supreme Court's remand of this case in light of DeShaney required us to consider whether Stoneking still may maintain a viable section 1983 claim if there is no predicate duty by defendants to protect her, we hold that she may because she has also alleged that defendants, with deliberate indifference to the consequences, established and maintained [**15] a policy, practice or custom which directly caused her constitutional harm.

III.

Defendants argue that Wright cannot be considered to have been acting pursuant to any School District policy and that it is outlandish and scandalou of Stoneking to suggest "that the school officials actually wanted and encouraged teachers to sexually abuse their students." Appellants' Supplementa Brief on Remand at 25. Stoneking did not, and need not, so suggest. As the Supreme Court stated in Canton, "[i]t may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees." 109 S.Ct. at 1205. Nonetheless, it continued, if the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, "the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." Id. It continued, "[i]n that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury." Id.

In any event, appellants' [**16] argument that there was no policy, custom or practice is a merits issue, which we cannot resolve on this interlocutory appeal. If there are contested issues of material fact, they must go to the jury. See Mitchell v. Forsyth, 472 U.S. 511, 527, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985) ("claim of immunity is [*726] conceptually distinct from the merits of the plaintiff's claim"); Turpin v. Mailet, 619 F.2d 196, 201 (2d Cir.), cert. denied, 449 U.S. 1016, 101 S. Ct. 577, 66 L. Ed. 2d 475 (1980) ("The issue of authorization, approval or encouragement is generally one of fact, not law."). As we suggested in Chinchello v. Fenton, 805 F.2d 126, 130-31 (3d Cir. 1986), the denial of a motion for summary judgment claiming qualified immunity based on the "I didn't do it" defense will not be immediately appealable under Mitchell. Nonetheless, we believe that we must decide whethe Stoneking has produced evidence sufficient to create a material issue of fact about the existence of a custom, practice or policy of deliberate indifference to misconduct by teachers, since that is directly related to the fact-specific" inquiry into the qualified immunity defense asserted by defendants. Anderson, 483 U.S. at 641.

IV.

The principles applicable to defendants' [**17] assertion of qualified immunity have not changed to any significant degree since our opinion in Stoneking I. It is the defendants' burden to establish that they are entitled to such immunity. Ryan v. Burlington County, 860 F.2d 1199, 1204 n.9 (3d Cir. 1988), cert. denied, 109 S. Ct. 1745, 104 L. Ed. 2d 182 (1989). The defendants must show that their conduct did "not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982).

Under the test announced in Harlow, reasonableness is measured by an objective standard; arguments that the defendants desired to handle or subjectively believed that they had handled the incidents properly are irrelevant. Anderson v. Creighton, 483 U.S. 635, 641, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987). The defendants are entitled to qualified immunity if reasonable officials in the defendants' position at the relevant time could have believed, in light of clearly established law, that their conduct comported with established legal standards. See id. at 641.

Harlow explicitly chose not to discuss the question of how to evaluate the "'state of the law'" during prior periods, leaving [**18] this issue to the lower courts. See 457 U.S. at 818 n.32 (citation omitted). This court does not require "relatively strict factual identity" between applicable precedent and the case at issue. People of Three Mile Island v. Nuclear Regulatory Comm., 747 F.2d 139, 144 (3d Cir. 1984). "[S]ome but not precise factual correspondence" to precedent would be required. Id.; see also Anderson, 483 U.S. at 640.

We expect officials to "apply general, well-developed legal principles." People of Three Mile Island, 747 F.2d at 144. We have explained that we have "adopted a broad view of what constitutes an established right of which a reasonable person would have known," Sourbeer v. Robinson, 791 F.2d 1094, 1103 (3d Cir. 1986), cert. denied, 483 U.S. 1032, 97 L. Ed. 2d 779, 107 S. Ct. 3276 (1987), which requires us to undertake "an inquiry into the general legal principles governing analogous factual situations, if any, and a subsequent determination whether the official should have related this established law to the instant situation." Hicks v. Feeney, 770 F.2d 375, 380 (3d Cir. 1985).

It may seem ludicrous to be obliged to consider whether it was "clearly established" that it was impermissible [**19] for school teachers and staff to sexually molest students. Nonetheless, we construe the proper inquiry as whether it was established that the students' rights were constitutionally based. Applying this standard, we reiterate the conclusion we reached in Stoneking I that the constitutional right Stoneking alleges, to freedom from invasion of her personal security through sexual abuse, was well-established at the time the assaults upon her occurred. The Supreme Court in considering the closely analogous right implicated by corporal punishment in schools, held that "[a]mong the historic liberties . . . protected [by the Due Process Clause] was [illegible] right to be free from . . . [*727] unjustified intrusions on personal security." Ingraham v. Wright, 430 U.S. 651, 673 & n.41, 51 L. Ed. 2d 711, 97 S. Ct. 1401 (1977). n2 See also Black v. Stepens, 662 F.2d 181, 188 (3d Cir. 1981), cert. denied, 455 U.S. 1008, 102 S. Ct. 1646, 71 L. Ed. 2d 876 (1982) ("[a]

law enforcement officer's infliction of personal injury on a person . . . may deprive a victim of a fourteenth amendment 'liberty'"); Curtis v Everette, 489 F.2d 516, 518-19 (3d Cir. 1973), cert. denied, 416 U.S. 995, 40 L. Ed. 2d 774, 94 S. Ct. 2409 (1974) (prisoner's liberty interest implicated in assault by fellow prisoner). [**20]

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n2 By 1980, this circuit had invoked Ingraham v. Wright in varied contexts. See, e.g., Romeo v. Youngberg, 644 F.2d 147 (3d Cir. 1980) (in banc) (right of mentally retarded to freedom from assault in state institution), vacated on other grounds, 457 U.S. 307, 315, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982) (but agreeing with court's application of Ingraham)); Halderman v. Pennhurst State School and Hospital, 612 F.2d 84, 98 (3d Cir. 1979) (in banc), rev'd, 451 U.S. 1, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981); United States ex. rel. Caruso v. United States Board of Parole, 570 F.2d 1150, 1157 (3d Cir.), cert. denied, 436 U.S. 911 (1978) (considering parole revocation challenge; noting that liberty for due process purposes extends to "[p]ersonal security from physical violence").

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

A teacher's sexual molestation of a student is an intrusion of the schoolchild's bodily integrity not substantively different for constitutional purposes from corporal punishment by teachers. Reasonable officials would hav understood the "contours" of a student's right to bodily integrity, under the Due Process Clause, to encompass a student's right to be free from sexual assaults by his or her teachers. See Anderson, 483 U.S. at 639-40 (discussing [**21] level of particularity required for definition of clearly established rights).

Since a teacher's sexual molestation of a student could not possibly be deemed an acceptable practice, as some view teacher-inflicted corporal punishment, a student's right to be free from such molestation may be viewed as clearly established even before Ingraham. See Rochin v. California, 342 U.S. 165, 172, 96 L. Ed. 183, 72 S. Ct. 205 (1952) (substantive due process violation occurs where conduct "shocks the conscience"); cf. Mitchell v. Forsyth, 472 U.S. 511, 534, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985) (right against warrantless security wiretaps was not "clearly established" where many successive administrations employed the practice and considered it constitutional).

We turn then from the issue of the clearly established constitutional right of Stoneking to be free from sexual abuse by school staff to an inquiry into the objective reasonableness of defendants' conduct from late 1980 through at least 1983 when Stoneking was molested by Wright while still a student. Anderson teaches us that this inquiry into reasonableness requires examination of the information possessed by the defendants. 483 U.S. at 641. We set forth some of the evidence in the [**22] record because the parties now agree that we are not limited to the allegations of the complaint on which our prior opinion was based. But see Stoneking I, 856 F.2d at 597-98 nn.5, 6 & 7.

According to the deposition testimony of Theresa Rodgers, her social studies teacher Richard DeMarte sexually accosted her in late 1977 or early 1978. See [illegible] F.Supp. at 1100 (summarizing Rodgers deposition). She immediately reported the incident to Miller and Smith. They responded by warning her that it would be her word against the teacher's and that she should not tell her parents. Id. Although Smith told Rodgers that he would "take care" of the problem, DeMarte's personnel file shows no evidence of any disciplinary action taken against him; to the contrary, his teaching evaluation showed a perfect score. Id.

According to the deposition testimony of Judith Grove Sowers, she was sexually assaulted by Wright in 1979 and reported the incident to Miller and Smith. She claims that Smith told her "it was my [Sowers'] fault. That's why he wanted to clear up the rumors because he wanted the band to get back on their feet again. . . . He had told me that if the rumors were true . . . I [**23] could find myself in front of a jury, in front [*728] of a judge, telling exactly what happened, that being that I had been drinking [and that I was] at his house voluntarily . . . I wouldn't look very good is what he said." Id. at 1101 n.24 (quoting deposition). Miller brought Wright to the office, asked Sowers to repeat her allegation in front of him, and asked Wright if it was true, which Wright denied. Supp. App. at 7 (Sowers deposition).

According to the deposition testimony of Sowers' father, who requested a conference with Miller and Sowers about the incident, the defendants attempted to persuade him that no teacher would behave as his daughter alleged. 667 F.Supp. at 1101 (citing deposition testimony). Both Sowers and her father testified that she was presented with the option of recanting her story in front of the band or withdrawing from all band activities. Id. Sowers stated that the [illegible]nd was assembled and she was called before it for this purpose, but fled from [illegible] room in tears. Id.

As the district court noted, it could be inferred that "the 'forced apology' served as a trump card in the hands of Edward Wright," who could threaten his other victims with similar [**24] treatment if they reported his actions, id. at 1101-02, and Stoneking in fact testified that she did not report Wright's assaults because "I knew about Judy Grove and what happened." Supp. App. at 16.

Smith's handwritten notes refer to three other incidents in 1981-1982 with respect to sexual harassment by DeMarte, the social studies teacher. In 1981, Lori Tsepelis complained to Miller and Smith that DeMarte had kissed her on the back of the neck several times while she was taking a make-up test. See Transcript of Deposition of Smith at 70-83. Ms. Tsepelis' parents also complained. Id. at 84-85. DeMarte admitted one kiss, explaining "that he had kissed her on the cheek as a thank you for her having brought food to him at the radio station on two occasions in November." Id. at 74. Smith conceded that when a teacher kisses a student it is generally a sexual advance, id. at 91, but Smith and Miller merely arranged that Ms. Tsepelis would, for the remainder of the semester, pick up her homework from DeMarte via Miller and that she would not be scheduled for DeMarte's class in the future. Although Smith told DeMarte "he had not used good judgment in having [Ms. Tsepelis] [**25] alone in the room," id. at 93, he placed no discipline report in DeMarte's file.

Two months later, two female students reported to Miller that another [illegible]tudent, Lorie Lamberson, was crying in the restroom and when she emerged she [illegible]d Smith and Miller that she had gone to DeMarte's room with a friend to get a [illegible]ke-up assignment, that he sent her friend away, blindfolded her to demonstrate the sense of touch, and after doing so was down on his hands and knees looking up her dress. The student was so distraught that she was sent to the nurse's office and then told to contact her parents. Id. at 99-106. When she spoke t her mother, she stated "'that she had a problem like Lori Tsepelis.'" Id. at 110. Although Smith testified that he subjectively believed Ms. Tsepelis' story, his own notes state that "'before sending [Ms. Lamberson] home I brought up the fact that she and her mother were aware of the incident with Mr. DeMarte and Lori Tsepelis prior to today and hoped that she wasn't involved in framing Mr. DeMarte.'" Id. at 112 (emphasis added). DeMarte admitted the incident except for the complaint that he had looked up Ms. Lamberson's dress. Nonetheless, Smith's [**26] notes continue, "'I also pointed out that it was her word against [DeMarte's] and that Mr. Miller and I would have to judge from that.'" Id. at 115. Again, the only action taken was to arrange that the student be scheduled for a different class, id. at 119, and no reprimand or other note was placed in DeMarte's file.

The next year, another parent called to complain about DeMarte's relationship with a student because DeMarte had asked the student to sit on his lap at a Halloween party on a social occasion, see id. at 151-53, and again no written warning was placed in DeMarte's file. Id. at 160.

In sum, there is evidence in the record that between 1978 and 1982 Smith and Miller [*729] received at least five complaints about sexual assaults of female students by teachers and staff members; that Shuey was told about some of these complaints; that Smith recorded these and other allegations in a secret file at home rather than in the teachers' personnel files, which a jury could view as active concealment; that the defendants gave such teachers excellent performance evaluations, which a jury could view as communication by the defendants to the teachers that the conduct of which [**27] they were accu would not be considered to reflect negatively on them; and that Smith and Miller discouraged and/or intimidated students and parents from pursuing complaints, on one occasion by forcing a student to publicly recant her allegation.

For this purpose, the fact that Stoneking did not complain to the defendants about Wright's molestation of her is not dispositive. See Ryan v. Burlington County, 860 F.2d at 1206-07 (prison officials not entitled to qualified immunity because, under the "reasonable official" standard, they should have known their actions were unconstitutional based on their general knowledge of the overcrowded prison conditions). Although Stoneking's failure to complain may be relevant at trial to her credibility or the causation issue, see id. at 1209, for qualified immunity purposes it is sufficient that there is adequate evidence that defendants were on notice of complaints of sexual harassment of students by teachers and staff at the school.

In their brief, defendants correctly state that "[i]n determining whether or not a public official is entitled to a defense of qualified immunity, one must identify legal principles governing analogous factual [**28] situations at the time the alleged constitutional violation occurred, and if any existed, determine whether the public officials should have related this established law to the situation before them." Appellants' Supp. Brief at 26.

After Monell had established that government officials could be held liable for policies and practices which they established and maintained, this court held in two cases in 1981 that public officials in administrative positions w notice of assaultive behavior by their subordinates must not take actions which communicate that they encourage or even condone such behavior.

In Commonweath v. Porter, 659 F.2d 306, 309 (3d Cir. 1981) (in banc), cert. denied, 458 U.S. 1121, 73 L. Ed. 2d 1383, 102 S. Ct. 3509 (1982), we considered the appeal of a chief of police and mayor who had been found liable by the district court for "engag[ing] in an extended pattern or practice of conduct denying persons lawfully in [the borough] their constitutional rights to be free from physical violence, mistreatment, threats, harassment . . . ." The physical violence had been inflicted by only one officer in the department, not by these two defendants. Instead, the charges against the police chief, much [**29] like those Stoneking raises against the defendants here, were that he received complaints about the conduct of the officer but took no steps to suspend, transfer or otherwise limit the officer's activities; publicly condoned the actions of the officer; and attempted to intimidate persons who complained about his conduct. Id. at 310. Similarly, the charges against the mayor stemmed from the fact that he received numerous complaints; carried out only perfunctory investigations, consisting merely "'of asking [the chief and the officer] whether there was any basis for the complaint'"; defended the officer publicly; and retaliated against officers who complained. Id. at 311 (quoting Commonwealth v. Porter, 480 F.Supp. 686, 702 (W.D. Pa. 1979)).

In the opinion of the majority affirming the district court's findings that the pattern of support shown by the police chief and mayor for the offending policeman amounted "'to a custom and usage under 42 U.S.C. @ 1983 and Monell,'" id. at 312 (quoting Commonweath v. Porter, 480 F.Supp. 686, 703 (W.D. Pa. 1979)), for which they could be held liable, we stated that Rizzo v. Goode, 423 U.S. 362, 46 L. Ed. 2d 561, 96 S. Ct. 598 (1976), "requires that we [**30] focus on the degree to which [the] Chief . . . participated in a pattern of violation by virtue of knowledge, acquiescence, support and encouragement." 659 F.2d at 321. A [*730] different majority found no basis for liability as to the Borough Council because the evidence as to it consisted primarily of failure to investigate complaints and passage of resolutions supporting the policemen, which was insufficient to establish a pattern or plan. "[N]o more than inaction and insensitivity" had been shown, which did not establish the requisite causal link under Rizzo v. Goode. Id. at 336-37.

Porter demonstrates clearly that by 1981 an administrator's policy of curtailing investigation of complaints brought to the administrator's attention, intimidation of complainants, and/or defense of subordinates charged with misconduct was sufficient to constitute a custom or practice under Monell.

Again in 1981, we held that a jury was entitled to hold a city and its chief of police liable for adopting a policy which postponed disciplinary investigation of an officer against whom a complaint was lodged until after resolution of any arrest charge stemming from the incident. Black v. Stephens [**31,] 662 F.2d 181 (3d Cir. 1981), cert. denied, 455 U.S. 1008, 102 S. Ct. 1646, 71 L. Ed. 2d 876 (1982). We found that this policy could be construed to encourage officers to bring charges against citizens who accused the police of misconduct, and that proximate causation could be established on this basis. We also held that the chief of police could be held liable for the promulgation and implementation of a policy which "encouraged the use of excessive force by the officers within the department." Id. at 183, 189-91.

Our holdings were consistent with those reached earlier by other courts of appeals. See, e.g., McClelland v. Facteau, 610 F.2d 693, 697-98 (10th Cir. 1979) (police chiefs may be held liable for failure to correct misconduct of which they have notice); Sims v. Adams, 537 F.2d 829, 832 (5th Cir. 1976) (complaint stated cause of action against mayor and chief of police for failure to cont police officer's propensity for violence); Turpin v. Mailet, 579 F.2d 152, 167-68 (2d Cir. 1978) (en banc) (city could be liable under the Fourteenth Amendment for encouraging animosity among police officers against plaintiff which led them to believe that they could violate his civil rights [**32] with impunity), vacated in light of Monell, 439 U.S. 974 (1978), reinstated, 591 F.2d 426 (2d Cir. 1979) (per curiam) (case reinstated on same theory but under @ 1983 in light of Monell); judgment for plaintiff reversed, Turpin v. Mailet, 619 F.2d 196, 202 (2d Cir.) (plaintiff failed to prove official policy where "there was no evidence of a prior pattern or practice of harassment"), cert. denied, 449 U.S. 1016, 101 S. Ct. 577, 66 L. Ed. 2d 475 (1980).

In sum, although the mere failure of supervisory officials to act or investigate cannot be the basis of liability, see Chinchello v. Fenton, 805 F.2d 126, 133-34 (3d Cir. 1986), by at least 1981 when this court's cases in Porter and Black were decided (both incidentally arising, as this case does, in the Western District of Pennsylvania), it was clearly established law that such officials may not with impunity maintain a custom, practice or usage that communicated condonation or authorization of assaultive behavior.

If the testimony of the various complainants is believed, Smith and Miller discouraged and minimized reports of sexual misconduct by teachers. A jury could construe such actions, as plaintiff's expert did, as "encourag[ing] [**33] a climate to flourish where innocent girls were victimized." Affidavit of Chet Kent, App. at 55. Judge Stapleton in his dissent argues that under the law as it existed at the relevant time, "qualified immunity could be denied only if the circumstances were such that a reasonable school administrator would have realized he was communicating his approval to the offending teacher." Typescript dissenting op. at 3. Although that may seem a farfetched possibility, there is en

gh in this record from Smith and Miller's suggestion to Ms. Lamberson about "framing" DeMarte and their statement that it was "her word against his," as well as from the forced apology by Judy Grove Sowers about her allegations of Wright's sexual harassment, that a jury could reasonably conclude that such discouragement of complaints [*731] amounted to a communication of condonation of the teacher's behavior. Thus, Stoneking has asserted a sufficiently tenable theory that there was an "affirmative link," see Rizzo v. Goode, 423 U.S. at 371, between her injury and the policies and practices that Smith and Miller employed and affirmative acts they took in furtherance of them to make this a jury issue.

We are cognizant [**34] that defendants deny many of these allegations, and assert that they imposed an adequate policy to deal with Stoneking's allegations against Wright by ordering Wright "never to get into a 'one on one' situation with female students again." Appellants' Supplemental Brief at 4. Whether there was an adequate policy and whether their other defenses have merit will be up to the jury.

On the other hand, we must conclude, in light of our precedent, that Stoneking's claims against Shuey amount to mere "inaction and insensitivity" on his part. See Porter, 659 F.2d at 337. We cannot discern from the record any affirmative acts by Shuey on which Stoneking can base a claim of toleration, condonation or encouragement of sexual harassment by teachers which occurred in one of the various schools within his district.

For the foregoing reasons, we conclude that the district court did not err in denying the motion for summary judgment of defendants Smith and Miller on grounds of qualified immunity, but we conclude that Shuey's motion should have been granted.

V.

As we have alluded to previously, trial of this case has been pending in the district court for a substantial period of time while the [**35] qualified immunity issue has been litigated. Our conclusion that Smith and Miller are not entitled to qualified immunity as a matter of law in their individual capacities is not in any way suggestive of any view on the merits of Stoneking's claim against them personally or against all of the defendants in their official capacities as to which no qualified immunity can be asserted. Thus, we are hopeful that upon remand this case can proceed to an expeditious conclusion.

For the reasons set forth above, we will affirm the district court's denial of the motion for summary judgment as to Smith and Miller on the grounds of qualified immunity, and we will vacate the district court's order denying the motion for qualified immunity as to Shuey in his individual capacity, and remand with directions that his motion be granted.

Costs on appeal are to be borne by appellants Smith and Miller.

CONCURBY: STAPLETON (In Part)

DISSENTBY: STAPLETON (In Part)

DISSENT: STAPLETON, Circuit Judge, concurring in part and dissenting in part:

After DeShaney, Ms. Stoneking's contention that the defendants owed her a well-established constitutionally based duty to protect her from Mr. Wright is no longer tenable. I agree with the court, [**36] however, that she alleges an alternative and distinct theory of liability that is not rejected in DeShaney. The issue for decision is whether the defendants have qualified immunity with respect to any damage liability that might be imposed upon them individually on that theory. The court concludes that Superintendent Shuey is entitled to immunity and I agree. I dissent, however, from the court's denial of immunity to Principal Smith and Assistant Principal Miller. Under Anderson v. Creighton, 483 U.S. 635, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987) and Harlow v. Fitzgerald, 457 U.S. 800, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982) cases, the relevant issue is whether reasonable school officials with the knowledge allegedly possessed by the defendants would have realized during the period from 1980 to 1983 that they were violating a well-established duty that they owed to Ms. Stoneking under federal statutory or constitutional law. That issue must be resolved by looking to the pre-1983 case law dealing with the circumstances under which a supervisor can be held liable for the constitutional tort of someone he or she supervises. [*732] As I read that case law n1, the only well-established duty imposed upon a supervisor by federal law was the duty to refrain [**37] from affirmative encouragement of the offending conduct. Accordingly, unless the complaint alleges such encouragement and unless Ms. Stoneking, after the filing of the motion for summary judgment, pointed to competent evidence from which a fact finder could find such encouragement, the defendants are entitled to immunity.

--------------------Footnotes--------------------

n1 The state of the law after City of Canton v. Harris, 489 U.S. 378, 109 S. Ct. 1197, 103 L. Ed. 2d 412, (1989), is simply not relevant to the issue presented by this appeal.

--------------------End Footnotes--------------------

In Commonwealth of Penn. v. Porter, 659 F.2d 306 (3d Cir. 1981), this court, ruling on Police Chief Porter's liability, held that "encouragement" was a prerequisite to liability. We there stated that Rizzo v. Goode, 423 U.S. 362, 46 L. Ed. 2d 561, 96 S. Ct. 598 (1976), "require[d] that we focus on the degree to which Chief Porter participated in a pattern of violation by virtue of knowledge, acquiescence, support and encouragement." 659 F.2d at 321 (emphasis added). We then cited the Chief's "active[] support" of the constitutional tortfeaser, and the "affirmative steps" he took to impede legal action against the subordinate. Id. at 322. As to the Mayor, the Porter court found that he had been "affirmatively involve[d]" with the [**38] constitutional tortfeasor and "strongly support[ed]" him. Id.

Porter's conclusions on this matter were reiterated in Black v. Stephens, 662 F.2d 181, 191 (3d Cir. 1981). In Black, this court stated that the evidence supported the jury's finding "of the encouragement and support required to hold the [police chief] liable under section 1983." (emphasis added). Finally, in Chinchello v. Fenton, 805 F.2d 126 (3d Cir. 1986), we first acknowledged that plaintiff might have an easier time proving supervisory liability in other circuits than in ours. We then reviewed Rizzo v. Goode, 423 U.S. 362, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976) and its progeny and concluded that supervisory liability could be found only where the official had both "contemporaneous knowledge of the offending incident or knowledge of a prior pattern of similar incidents" and where there were "circumstances under which the supervisor's inaction could be found to have communicated a message of approval to the offending subordinate." 805 F.2d at 133 (emphasis added).

Under these cases, I am unable to say that a reasonable school administrator would understand that he would violate the well-established constitutional [**39] rights of students by failing to pursue a complaint of sexual abuse by a teacher with sufficient aggressiveness or even by discouraging such complaints. Under the law as it then existed, qualified immunity could be denied only if the circumstances were such that a reasonable school administrator would have realized he was communicating his approval to the offending teacher.

I acknowledge that in some contexts failures to discipline teachers shown to have misbehaved and discouragement of complaints about misbehaving teachers might conceivably be a part of a pattern of conduct that would communicate approval by the administration. However, where the misconduct at issue is sexual abuse of high school students and where the administrator has expressly instructed the offending teacher never again to be alone with a female student, it would take a lot more than this record contains to permit a fact finder to conclude that Wright understood the administration to favor his misdeeds.

Because Ms. Stoneking has neither alleged nor shown evidence of affirmative encouragement of Wright's conduct by the individual defendants, I would hold t all three are entitled to immunity.

9TH CASE of Level 1 printed in FULL format.

J.O. and P.O., Individually and as parents and next friends of D.O., J.B. and C.B., Individually and as parents and next friends of S.B., E.S. and B.S., Individually and as parents and next friends of M.S., Plaintiffs-Appellants, v. ALTON COMMUNITY UNIT SCHOOL DISTRICT 11, EUGENE L. FRIZZO, E. M. ERVIN, DAVID P. LAUSCHKE, VERNA J. LEWIS, JOYCE ROBINSON, BOB L. PERICA, SANDRA L. STROHMEIER, all individually and in their official capacity as members of the Alton Community Unit School District 11 Board of Education, DR. DAVID B. VANWINKLE, Individually and in his official capacity as Superintendent of the Alton Community Unit School District 11, JAMES B. CLARK, Individually and in his official capacity as Principal of East Middle School of the Alton Community Unit School District 11 and LESTER MANN, Defendants-Appellees

No. 89-1441

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

909 F.2d 267; 1990 U.S. App. LEXIS 13174

April 4, 1990, Argued
August 3, 1990, Decided

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the Southern District of Illinois, Alton Division. No. 88 C 5295 -- William L. Beatty, Judge.

DISPOSITION: AFFIRMED AND REMANDED

COUNSEL: Lynn M. Travis, COPPINGER, CARTER, SCHREMPF & BLAINE, Alton, Illinois, for Plaintiff-Appellant.

C. Dana Eastman, Jr., THOMAS, MOTTAZ, EASTMAN & SHERWOOD, Alton, Illinois, Joseph B. McDonnell, CHURCHILL & MCDONNELL, Belleville, Illinois, for Defendant-Appellees.

John M. Delaney, Jr., ALLEN, MENDENHALL & ASSOCIATES, Alton, Illinois, for Lester Mann, Defendant-Appellee.

JUDGES: Wood, Jr., and Coffey, Circuit Judges, and Noland, Senior District Judge. *

* Honorable James E. Noland, Senior District Judge for the Southern District of Indiana, is sitting by designation.

OPINIONBY: WOOD, Jr.

OPINION: [*268] WOOD, Jr., Circuit Judge.

An involved procedural question complicates this action under 42 U.S.C. @ 1983, originally brought in state court with a plethora of state claims. The endants removed this case to federal court and promptly moved for a dismissal of the plaintiffs' section 1983 claims. The district court granted this motion and, with only pendent state claims remaining, sua sponte remanded the case back to state court. The plaintiffs now appeal the district court's [**2] actions.

I. FACTUAL BACKGROUND

Bringing this action both individually and on behalf of their school-age children, the plaintiffs allege that Lester Mann sexually molested the children while employed as a teacher with the Alton Community Unit School District No. 11. In the federal counts of their complaint, the plaintiffs sue the school district, the school board members, the school superintendent, and the school principal [hereinafter "school defendants"] under 42 U.S.C. @ 1983 for violation of their fourteenth amendment rights. In addition to the civil rights counts, the plaintiffs also sued these same defendants and Mann under state tort law. This suit was originally filed in the Third Judicial Circuit for the state of Illinois.

Unhappy with the state forum, the school defendants removed this case to the United States District Court for the Southern District of Illinois. Pursuant to FED. R. CIV. P. 12(b)(6), these defendants then filed motions to dismiss the plaintiffs' section 1983 claims as well as some of their state claims. The district court granted the defendants' motion as to the section 1983 claims. Left with only pendent state claims, the district court remanded the case [**3] back to state court on its own motion.

Having brought the case in state court originally, the plaintiffs are now displeased to have to return there without their civil rights claims. Therefore, the plaintiffs asked the district court to reconsider its remand order or, in the alternative, for leave to amend their complaint. In a short order, the district court concluded that once it had remanded the case to state court, it was without jurisdiction to take any further [*269] action. n1 Therefore, the court denied the plaintiffs' motion. The plaintiffs have now appealed from all of the district court's orders.

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n1 The plaintiffs filed their notice of appeal within thirty days of both the district court's original remand and its denial of reconsideration. Consequently, the timeliness of the plaintiffs' appeal does not depend upon their motion for reconsideration tolling the time in which to file a notice of appeal. See FED. R. APP. P. 4(a)(4). Therefore, we need not discuss the district court's power to entertain the plaintiffs' motion to reconsider and its effect on the timeliness of the plaintiffs' appeal.

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[**4]

II. JURISDICTION

Although neither party addressed it, there are involved jurisdictional stions about our review of the district court's orders. In effect, the district court's actions encompassed two orders. First, the district court determined that the plaintiffs' complaint failed to state a cause of action under section 1983, dismissed that portion of the complaint, and refused to allow the plaintiffs to amend their complaint. Second, with only pendent sta claims remaining, the district court exercised its discretion and remanded these claims back to state court. Thus, the district court's holdings can be separately characterized as a dismissal order and a remand order. Although we are satisfied that we have jurisdiction to review both of the district court's orders, our jurisdiction is not so self-evident that we can dispense with a tedious discussion.

A. Jurisdiction over Remand Order

Taking the district court's decisions in reverse order, the first jurisdictional question is whether we have the power to review the district court's order remanding this case on the discretionary grounds that only pendent state claims remain. Under 28 U.S.C. @ 1447(d), "an order remanding [**5] a case to the State court from which it was removed is not reviewable on appeal or otherwise." n2 On its face, subsection [*270] 1447(d) appears to be an absolute bar against appellate review of any district court remand order.

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n2 The plaintiffs suggest that we have jurisdiction over this case under an exception listed in subsection 1447(d), providing for appellate review of "an order remanding a case to the State court from which it was removed pursuant to section 1443 . . . ." Thus, the question becomes whether this is a case that could be removed pursuant to section 1443. Codified amidst the other removal statutes and captioned "Civil rights cases," section 1443 might appear to encompass section 1983 actions. A reading of this section, however, plainly reveals that Congress had a different concern in mind when it passed section 1443. First, defendants may remove cases where they can show both that "(1) the right allegedly denied it arises under a federal law providing for specific rights stated in terms of racial equality; and (2) the removal petitioner is denied or cannot enforce the specified federal rights in the state courts due to some formal expression of state law." Texas v. Gulf Water Benefaction Co., 679 F.2d 85, 86 (5th Cir. 1982) (emphasis in original) (citing Johnson v. Mississippi, 421 U.S. 213, 219 (1975)); see 28 U.S.C. @ 1443(1). Second, defendants may remove cases where they are the target of a civil action or criminal prosecution for acts (or a refusal to act) taken under the color of authority derived from a law providing for equal rights. See 28 U.S.C. 1443(2). Basically, the purpose of section 1443 is to protect defendants from groundless state charges based on race, assuming that a federal court will be more protective of federally guaranteed equal rights. See Walker v. Georgia, 417 F.2d 5, 9 (5th Cir. 1969). Congress intended section 1443 to provide for the removal of cases involving equal rights laws couched in terms of equality. Section 1443 simply does not apply to laws such as the due process clause and 42 U.S.C. @ 1983 that work to guarantee rights available to all persons or citizens. See Georgia v. Rachel, 384 U.S. 780, 792 (1966); Sunflower County Colored Baptist Ass'n v. Trustees of Indianola Mun. Separate School Dist., 369 F.2d 795, 796 (5th Cir. 1966); New York v. Galamison, 342 F.2d 255, 266 (2d Cir.), cert. denied, 380 U.S. 977 (1965).

The inapplicability of section 1443 can also be seen in the procedural posture of this case. Although section 1443 was meant to protect a defendant' equal rights in state courts, in this case the plaintiffs are the parties arguing for its application. The plaintiffs are now trying to use section 1443 as a means to keep this case before the federal courts. Clearly, Congress did [illegible] intend section 1443 to guarantee a federal forum for plaintiffs' section 1983 claims, when the plaintiffs could have secured a federal forum for themselves by filing their suit in federal court initially. Simply stated, section 1443 was meant as a shield for racially persecuted defendants, and the plaintiffs' attempt to use it as a sword belies their own argument that it applies to this appeal. Because this is not a case that could be removed under section 1443, the exception in subsection 1447(d) does not allow appellate review in this case.

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[**6]

But appearances can be deceiving; in practice, subsection 1447(d) has been given a less restrictive application. In Thermtron Products v. Hermansdorfer, 423 U.S. 336 (1976), the Supreme Court held that subsection 1447(d) should be construed together with the grounds for remand in 28 U.S.C. @ 1447(c). See 423 U.S. at 345-46. The result was a rule allowing appellate court review of any remand order entered on grounds other than those specified in subsection 1447(c). n3 See 423 U.S. at 350-51. Consequently, some courts interpreted subsection 1447(c) as stating the exclusive grounds for remand and disapproved district courts' remands on any other grounds, including remands of pendent state law claims. E.g., Cook v. Weber, 698 F.2d 907, 909-10 (7th Cir. 1983).

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n3 At the time of Thermtron Products, subsection 1447(c) authorized remand of [illegible] cases removed "improvidently and without jurisdiction." 28 U.S.C. @ 1447(c) (1982). That statute has now been amended to authorize remand of cases on either the basis of a defect in removal procedure or the lack of subject matter jurisdiction in the federal court. 28 U.S.C.A. @ 1447(c) (West Supp. 1990).

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In Carnegie-Mellon University v. Cohill, 484 U.S. 343 (1988), the Supreme Court overruled this lower-court interpretation of subsection 1447(c) and held that a district court may exercise its discretion to remand a case back to state court when all independent federal bases for jurisdiction are gone and only pendent state claims remain. 484 U.S. at 357. In making this ruling, the Supreme Court's majority opinion acknowledged that subsection 1447(c) did not authorize such a remand but instead held that traditional principles of pendent jurisdiction allowed a district court to relinquish jurisdiction over a removed case that involved only pendent claims. See 484 U.S. at 348-52, 355 n. 11. Thus, by framing its decision in terms of pendent jurisdiction, Carnegie-Mellon reinforces the proposition that a remand of pendent state claims is outside the grounds for removal listed in subsection 1447(c).

This aspect of Carnegie-Mellon returns us to the rule earlier articulated in Thermtron Products: federal appellate courts have the power to review orders remanding a case on grounds other than those listed in subsection 1447(c). Read together, the holdings in Carnegie-Mellon [**8] and Thermtron Products authorize appellate jurisdiction over a district court's remand of pendent state claims. The most notable support for such an interpretation would be Carnegie-Mellon itself, where the Supreme Court heard an appeal from an appeal of a district court's remand of pendent state claims. In Carnegie-Mellon the

Court decided the district court's power to order the remand but never suggested that it and the lower appellate court lacked the power to hear an appeal from the district court's order. Furthermore, a panel of this court divided over the propriety of a remand order in Rothner v. City of Chicago, 879 F.2d 1402 (7th Cir. 1989), but uniformly commented that appellate jurisdiction would exist in the case of a remand of pendent state claims. See 879 F.2d at 1406, 1420. At least one other court of appeals has also read Thermtron Products and Carnegie-Mellon in a similar manner. See In re Life Ins. Co. of North America, 857 F.2d 1190, 1193 n. 1 (8th Cir. 1988).

Based on Thermtron Products, Carnegie-Mellon, and this and other courts' comments, we find appellate jurisdiction exists over the part of the district court's order remanding [**9] the pendent state law claims, but we pause to comment on two other aspects of the case that complicate our decision. First, in addition to specifying the grounds for remand, subsection 1447(c) requires a certified copy of the district court's remand order to be mailed to the clerk of the state court. The record in this case does not indicate that the district court mailed a certified copy of its order to the state court, and we assume this means that the Illinois state courts have not yet reasserted jurisdiction over [*271] this case. Nevertheless, there is no suggestion that the district court's failure to mail a certified copy of its order constitutes a jurisdictional bar to our review of the case. Despite its noncompliance with the procedural requirements, the district court clearly intended its remand order to be a final disposition of the case. A second problem arises with respect to the plaintiffs' direct appeal from the remand order. The Supreme Court's holding in Thermtron Products, indicates that our only power to review a remand order is through a petition for a writ of mandamus. See 423 U.S. at 352-53. We will follow the same course as we have in the past and treat the [**10] direct appeal from the remand order as a petition for a writ of mandamus. See Rothner, 879 F.2d at 1418.

B. Jurisdiction over Dismissal Order

Deciding that we have jurisdiction over the part of the district court's holding that remands this case to the state court, we now must turn to the other part of the district court's holding that dismissed the plaintiffs' section 1983 claims and refused to allow an amendment of their pleadings. Two alternative bases support our jurisdiction over the district court's order to dismiss.

First, a proper review of the remand order should encompass all rulings leading up to that order, similar to the rule that a timely appeal from a final judgment brings up for review all prior rulings of the trial court. In this case, the district court dismissed the plaintiffs' section 1983 counts, the sole basis for federal jurisdiction. Because the district court then remanded the remaining pendent state claims, it would only be appropriate that the district court's dismissal of the federal jurisdictional basis be considered to determine whether the remand was appropriate.

Second and alternatively, appellate jurisdiction over the district court's dismissal [**11] order is authorized by a derivative of the Thermtron Products exception to the bar against appellate review of remand orders. Generally, courts have heard appeals from a district court's decision on the merits of a removed case, even where the district court has already purported to remand the case back to state court. See, e.g., Waco v. United States Fidelity & Guar. Co., 293 U.S. 140 (1935); Price v. PSA, Inc., 829 F.2d 871, 874 (9th

r. 1987), cert. denied, 486 U.S. 1006 (1988); Gallea v. United States, 779 F.2d 1403, 1404 (9th Cir. 1986); Pelleport Investors, Inc. v. Budco Quality Theatres, Inc., 741 F.2d 273, 276-77 (9th Cir. 1984). This rule provides appellate review, where it might otherwise not be available, to a party adversely affected by a district court's substantive decision. Price, 829 F.2d at 874; Gallea, 779 F.2d at 1404. In this case, our review of the district court's dismissal order will provide federal appellate consideration of the merits of the plaintiffs' federal claims, review that might not otherwise be available. Thus, we can also exercise jurisdiction over the district court's dismissal order as a substantive determination [**12] of the plaintiffs' claims.

III. DISCUSSION

The substance of the plaintiffs' appeal presents two issue for discussion. First, do the plaintiffs' claims of child molestation state a claim for deprivation of a constitutionally protected liberty interest on the basis of a special relationship between the school defendants and the minor schoolchildren? Second, should the district court have afforded the plaintiffs a chance to amend their complaint?

A. Deprivation of a Liberty Interest

In connection with the plaintiffs' section 1983 claim, it is first necessary to pinpoint their exact legal theory. The plaintiffs are only suing the school fendants for deprivation of their liberty interest; Mann, the actual child lester, has not been named in the civil rights counts of the plaintiffs' complaint, and the plaintiffs do not allege that any of the named school defendants participated in any acts of child molestation. In addition, the plaintiffs do not allege that the school defendants promoted [*272] school policies that "encourag[ed] a climate to flourish where innocent [children] were victimized." n4 Stoneking v. Bradford Area School Dist., 882 F.2d 720, 730 (3d Cir. 1989), cert. denied, [**13] 110 S. Ct. 840 (1990). Given the prohibition against respondeat superior liability in section 1983 suits, see Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 691 (1978), the plaintiffs also do not argue the school defendants are liable merely as the child molester's employers. Instead, both in the district court and in this court, the plaintiffs argue that the school defendants had a "special relationship" to the schoolchildren, imposing an affirmative duty to provide for their safety and to prevent the child abuse that occurred in this case.

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n4 In their complaint, the plaintiffs do allege that the acts or omissions of the school defendants were committed "under the color of pretenses of the statutes, ordinances, regulations, customs, and usages of the State of Illinois, and the rules, policies, and directions of the Alton Community Unit School District No. 11." Reading the complaint as a whole, this language was obviously intended to satisfy section 1983's "color of state law" requirement and, even with a liberal construction of the complaint, does not provide notice that the intiffs allege the school defendants promulgated policies that fostered child se. Furthermore, the plaintiffs literally allege only that the school defendants' actions were taken under the color of school district policies, not that these defendants had any role in enacting those policies. For these reasons, we will not construe the complaint as alleging that the school defendants were responsible for official policies that allowed the schoolchildren to be sexually abused.

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[**14]

Unfortunately for the plaintiffs, the due process clause is not "a guarantee of certain minimal levels of safety and security." DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998, 1003 (1989). Both this court and the Supreme Court have repeatedly rejected attempts to read the fourteenth amendment's due process clause as an affirmative charter of governmental duties. See, e.g., id. at 1004-07, Archie v. City of Racine, 847 F.2d 1211, 1220-23 (7th Cir. 1988), cert. denied, 109 S. Ct. 1338 (1989). Only where the state has exercised its power so as to render an individual unable to care for himself or herself may an affirmative duty to protect that individual arise. DeShaney, 109 S. Ct. at 1005-06. But beyond the case of incarcerated prisoners and involuntarily committed mental patients, the Supreme Court has never recognized such a duty. See Youngberg v. Romeo, 457 U.S. 307 (1982) (mental patients); Estelle v. Gamble, 429 U.S. 97 (1976) (prisoners).

We do not suggest that prisoners and mental patients are an exhaustive list of all persons to whom the state owes some affirmative duties, but the government, acting through local school administrations, [**15] has not rendered its schoolchildren so helpless that an affirmative constitutional duty to protect arises. Whatever duty of protection does arise is best left to laws outside the Constitution, as Illinois has done. See, e.g., Eversole v. Wasson 80 Ill. App. 3d 94, 398 N.E.2d 1246, 35 Ill. Dec. 296 (1980) (recognizing student's tort suit against school district for injuries inflicted in a teacher's assault).

The state's custody over their person is the most distinguishing characteristic in the cases of the mental patient and the prisoner; these people are unable to provide for basic human needs like food, clothing, shelter, medical care, and reasonable safety. See DeShaney, 109 S. Ct. at 1005. At most, the state might require a child to attend school, see ILL. REV. STAT. ch. 122, para. 26-2, but it cannot be suggested that compulsory school attendance makes a child unable to care for basic human needs. The parents still retain primary responsibility for feeding, clothing, sheltering, and caring for the child. By mandating school attendance for children under the age of sixteen, the state of Illinois has not assumed responsibility for their entire personal lives; these [**16] children and their parents retain substantial freedom to act. The analogy of a school yard to a prison may be a popular one for school-age children, but we cannot recognize constitutional duties on a child's lament. Schoolchildren are not like mental patients and prisoners such [*273] that the state has an affirmative duty to protect them.

Before we leave this constitutional discussion, we need to comment on other rights that the plaintiffs claim were taken from them. In addition to a taking of a liberty interest in violation of the fourteenth amendment, the plaintiffs also claim they were deprived of the right to an education free from government interference and of their fourth amendment search and seizure rights, as incorporated by the fourteenth amendment. We do not express any opinion on the merits of the plaintiffs' alternative characterization of their rights except to say that it adds little to their case. The plaintiffs do not allege that any of the school defendants deprived them of these other civil liberties but that school defendants' agent violated these liberties. What the plaintiffs need to show is not an expansive list of liberties allegedly taken from them but some action [**17] by the defendants that would justify the imposition of liability. The plaintiffs have failed to make this showing no matter how their rights are characterized, and for this reason their claims must fail.

B. Amendment of Pleadings

The foregoing discussion dispenses of the plaintiffs' claims on the basis of the complaint as it stands before us, but we do not believe that the plaintiffs could never allege sufficient facts to support a section 1983 claim. See Stoneking v. Bradford Area School Dist., 882 F.2d 720 (3d Cir. 1989) (recognizing section 1983 cause of action where school administrators enacted policies that allowed child sexual abuse to flourish). Thus, the plaintiffs should have been allowed a chance to replead their complaint, but after the district court dismissed the plaintiffs' section 1983 claim and sua sponte remanded the case, it refused to allow an amendment of the pleadings on the basis that jurisdiction over the case had returned to the state courts. In the future, a district court may avoid this conundrum by reserving the decision to remand rather than remanding sua sponte immediately after a dismissal of all federal claims. An immediate remand fails to give [**18] the plaintiff a chance to cure defects in his complaint.

The plaintiffs have asked this court, should we hold against them on the merits, to return this case to the district court with instructions to allow an ndment of their pleadings. While it is usually within the district court's cretion to allow an amendment, in this case the district court believed it had no discretion to exercise because the case was no longer within its jurisdiction. The district court found itself powerless to allow an amendment. In this reasoning, the district court was probably correct; the majority of courts hold that once a district court remands a case, it is usually powerless to take any further action on that case. E.g., Seedman v. United States District Court, 837 F.2d 413, 414 (9th Cir. 1988); In re La Providencia Dev. Corp., 406 F.2d 251, 252-53 (1st Cir. 1969); Board of Educ. v. City-Wide Comm. for the Integration of Schools, 342 F.2d 284, 285 (2d Cir. 1965); City of Valparaiso v. Iron Workers Local 395, 118 F.R.D. 466, 468-69 (N.D. Ind. 1987). Contra 67 Goffle Road, Inc. v. Playboy Hotel Casino, 527 F. Supp. 566, 569 (D.N.J. 1981).

Nevertheless, this is not the usual [**19] case. As we discussed above, we have jurisdiction to hear an appeal over the entire case, including both the district court's decision to dismiss the plaintiffs' federal claims as well its decision to remand the case. When we would have jurisdiction to review a remand order, it would be efficient to allow the district court also to retain jurisdiction to reconsider its order or, as in this case, to allow an amendment of the pleadings. See In re Shell Oil Co., 631 F.2d 1156, 1158 (5th Cir. Unit A 1980). Of course, the filing of a notice of appeal would end the district court's jurisdiction over its remand order as it would in any other case. We leave for another day the question of whether a district court has the power to take any further action in a case after it issues a remand order over which no appellate jurisdiction exists. We only hold that where an exception to the eral bar against the nonreviewability of remand orders applies, the district t has the [*274] power to reconsider its order during the time for filing a notice of appeal.

Allowing a district court to reconsider its remand order is no more disruptive of the litigation process than is allowing an appeal from that [**20] order: both reconsideration and an appeal present the danger that the remand order will be rescinded thereby disrupting state proceedings that may have restarted after the remand. n5 Thus, during the time when an appeal can follow a remand order, it is also appropriate for the district court to retain the power to modify its earlier orders. Such a procedure may have salutary benefits by eliminating the necessity for an appeal, as might have happened in this case had the district court allowed the plaintiffs a chance to amend their pleadings.

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n5 The danger of disrupting ongoing state proceedings in this case appears to have been eliminated. The record does not reveal that the district court clerk mailed a certified copy of the remand order to the state court, a prerequisite to send the case back. See 28 U.S.C. @ 1447(c). While such a procedure may minimize the possibility of disruption of state judicial proceedings by the federal appellate process, its informality may create problems in the future. If the parties to this suit were concerned that our decision would interrupt state court proceedings, the proper procedure would have been to apply for a stay of these proceedings pending our disposition of the appeal.

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[**21]

Normally, we are slow to overturn a district court's decision not to allow amendment of pleadings. In the present case, however, the district court did not make such a decision. Confronted with a bewildering procedural situation, the district court understandably believed it had no power to allow an amendment. The federal rules generally allow for a liberal amendment of pleadings, see FED. R. CIV. P. 15(a), and we believe that justice would be served by returning this case to district court with instructions to allow the plaintiffs to replead their section 1983 claims. In allowing an amendment, we remind the plaintiffs that they must make new, good faith factual allegations, pleading a new theory of liability other than the one rejected here. See FED. R. CIV. P. 11. We have rejected the plaintiffs' allegations that the school defendants, simply by virtue of their relationship to the plaintiffs, are liable for their failure to prevent the child abuse. Should the plaintiffs be unable to replead a proper federal cause of action, the district court can then remand the pendent state claims back to state court under Carnegie-Mellon.

IV. CONCLUSION

In summary, we have found [**22] appellate jurisdiction to exist over both the district court's dismissal of the plaintiffs' section 1983 claims and its remand of the pendent claims to state court. While we agree that the plaintiffs did not state a proper section 1983 cause of action on their original complaint, we believe that the district court should have allowed them a chance to replead. Accordingly, the order of the district court dismissing the plaintiff's section 1983 claims is AFFIRMED; a writ of mandamus will issue requiring the district court to rescind its order remanding the case back to state court; and the ca[illegible] is REMANDED with directions. The parties will bear their own costs on appeal.

Jane Doe "A", a minor under age of fourteen, by and through her Mother and Next Friend, Jane Doe "B"; John Doe "C", a minor under the age of fourteen, by and through his Mother and Next Friend, Jane Doe "C"; John Doe "D", a minor under the age of fourteen, by and through his Mother and Next Friend, Jane Doe "D"; John Doe "E", a minor under the age of fourteen, by and through his Mother and Next Friend, Jane Doe "E"; John Doe "F", a minor under the age of fourteen, by and through his Mother and Next Friend, Jane Doe "F"; John Doe "H", a minor under the age of fourteen, by and through his Mother and Next Friend, Jane Doe "H"; John Doe "I", a minor under the age of fourteen, by and through his Mother and Next Friend, Jane Doe "I"; John Doe "J", a minor under the age of fourteen, by and through his Mother and Next Friend, Jane Doe "J"; John Doe "K", a minor under the age of fourteen, by and through his Mother and Next Friend, Jane Doe "K"; John Doe "L", a minor under the age of fourteen, by and through his Mother and Next Friend, Jane Doe "L"; John Doe "M", a minor under the age of fourteen, by and through his Mother and Next Friend, Jane Doe "M"; Jane Doe "B", individually, as Mother of Jane Doe "A:; Jane Doe "C", and Father "C", individually, as parents of John Doe "C"; Jane Doe "D", and Father "D", individually, as parents of John Doe "D"; Jane Doe "E", and Father "E", individually as parents of John Doe "E"; Jane Doe "F", and Father "F", individually, as parents of John Doe "F"; Jane Doe "G", individually, as Mother of John Doe "G"; Jane Doe "H", and Father "H", individually, as parents of John Doe "H"; Jane Doe "I", individually, as Mother of John Doe "I"; Jane Doe "J", and Father "J", individually, as parents of John Doe "J"; Jane Doe "K", and Father "K", individually, as parents of John Doe "K"; Jane Doe "L", and Father "L", individually, as parents of John Doe "L"; and Jane Doe "M", individually, as Mother of John Doe "M", Appellants, v. The Special School District of St. Louis County; Samuel A. Scarnato, individually, and as Superintendent of The Special School District of St. Louis County; Shirley Marchlewski, individually, and as Head of Transportation, North Garage, The Special School District of St. Louis County; Susan Stotler, individually, and as Assistant Superintendent of The Special School District of St. Louis County; Juanita Campbell, individually, and as Head of Transportation of The Special School District of St. Louis County; and Joan Hill, individually, and as Assistant Head of Transportation of The Special School District of St. Louis, County, Appellees

No. 88-2537

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

901 F.2d 642; 1990 U.S. App. LEXIS 5923

June 14, 1989, Submitted April 17, 1990, Filed

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the Eastern District of Missouri. Honorable John F. Nangle, Judge.

COUNSEL: Counsel who presented argument on behalf of the appellant was Ross H. Briggs, St. Louis, Missouri.

Counsel who presented argument on behalf of the appellees was John H. Quinn, St. Louis, Missouri.

JUDGES: John R. Gibson and Wollman, Circuit Judges, and John R. Browm, * Senior Circuit Judge.

* The Honorable John R. Brown, United States Senior Circuit Judge for the Fifth Circuit, sitting by designation.

OPINIONBY: WOLLMAN

OPINION: [*643]

WOLLMAN, Circuit Judge.

Plaintiffs, eleven handicapped children, appeal the district court's n1 grant of summary judgment in favor of the Special School District of St. Louis County (District), and the five individual defendants: Dr. Samuel Scarnato, Susan Stotler, Shirley Marchlewski, Juanita Campbell, and Joan Hill. We affirm.

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n1 The Honorable John F. Nangle, Chief Judge, United States District Court for the Eastern District of Missouri.

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I. BACKGROUND

The District provides educational programs for handicapped children. To carry out these programs, the district utilizes some 220 buses to transport the children to the various schools throughout the District. [**2] Some of the handicapped children so transported are placed on the buses in their wheelchairs. Others, because of their inability to control their body movements, are placed in physical restraints for their self-protection during the course of the bus trip. Aides ride on certain of the buses to administer to the needs of those children who might be subject to seizures while on the bus.

David Cerny was a bus driver for the District during the 1983-1984 and 1984-1985 school years. On February 8, 1985, Cerny was arrested for sexual abuse. He later pleaded guilty to charges of child abuse involving five children.

Plaintiffs brought this action pursuant to 42 U.S.C. @ 1983, alleging that defendants had deprived them of their right to substantive due process in that Cerny's acts of [*644] physical and sexual abuse had deprived them of ir liberty interest in personal privacy and bodily security.

The district court granted summary judgment in favor of all defendants, concluding that a rational trier of fact could not find that the individual defendants had notice of, displayed deliberate indifference to, or tacitly authorized the alleged unconstitutional misconduct, or that the District had a [**3] policy or custom of ignoring complaints of physical or sexual abuse. n2

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n2 Jane Doe "A" v. Special Sch. Dist. of St. Louis, Co., 682 F.Supp. 451 (E.D.Mo. 1988). The earlier procedural history of this case is set forth in Jane Doe "A" v. Special Sch. Dist. of St. Louis Co., 637 F.Supp. 1138 (E.D.Mo. 1986).

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The district court's memorandum opinion fairly and accurately sets forth the evidence supporting plaintiffs' allegations, Jane Doe "A", 682 F.Supp. 451, 454-55, and we will only summarize that evidence here.

Defendant Dr. Scarnato, the District's superintendent, received a single complaint from a parent that on one occasion Cerny had cursed at her and called her names in front of the children on the bus. Dr. Scarnato may also have received information from a District employee that Cerny had kissed a child on e bus.

Defendant Campbell, director of transportation, was told by defendant Marchlewski that Cerny had kissed a boy and was also told by Ms. Marchlewski or defendant Hill that Cerny used foul language on the bus.

Defendant Marchlewski, supervisor of the north bus garage, and defendant Hill, supervisor of bus aides at the north garage, received complaints [**4] that Cerny used profanity on the bus, had kissed a boy on the bus, and had pushed one of the plaintiffs down the bus steps and pulled his hair. Ms. Marchlewski also received complaints that Cerny had failed to follow a child's behavior modification program and that he had failed to hand out a bus pass; she also received a complaint that Cerny had kissed and kicked a child and had given him a "snuggle." n3 Ms. Hill received a complaint that a child had not been picked up at his bus stop and that Cerny had physically restrained one of the plaintiffs in order to break up a fight.

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n3 This child is no longer a party to this action, having voluntarily dismissed his complaint against defendants.

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Defendant Stotler, area coordinator for the District, received many of the e complaints received by the other individual defendants. In addition, in ctober of 1984 she allegedly received a complaint from a parent that Cerny had put his hand down a boy's pants and pulled down a boy's pants and spanked him. Shortly before Cerny's arrest in February of 1985, one of the plaintiffs told

Ms. Stotler that Cerny had been touching boys' crotches.

The district court concluded that the isolated incidents [**5] reported to Dr. Scarnato and Ms. Campbell could not lead to a finding by a rational trier of fact that these two defendants had notice of a pattern of unconstitutional acts and were thereafter deliberately indifferent to or tacitly authorized the alleged physical and sexual abuse of plaintiffs.

With respect to the complaints received by Ms. Marchlewski and Ms. Hill, the district court concluded that although some of the reported incidents might have risen to the level of common law torts, they did not constitute constitutional violations. Accordingly, the district court concluded that the complaints received by Ms. Marchlewski and Ms. Hill did not constitute notice of a pattern of unconstitutional actions and that any failure on the part of Ms. Marchlewski and Ms. Hill to act upon those complaints did not amount to deliberate indifference to or tacit authorization of the alleged physical and sexual abuse of the plaintiffs.

The district court held that the complaints received by Ms. Stotler in October of 1984 and shortly before Cerny's arrest in February of 1985 were insufficient to establish notice of a pattern of unconstitutional conduct necessary to support a finding of liability [**6] under section 1983. The district court held that although Ms. Stotler [*645] may have been negligent in her lack of response to the October 1984 complaint, that negligence would not result in liability under the fourteenth amendment. The district court observed that the report received by Ms. Stotler in 1985 came shortly before Cerny's arrest and thus could not be viewed as supporting a finding that Ms. Stotler deliberately indifferent to Cerny's alleged violations of plaintiffs' constitutional rights.

The district court summarized its review of the evidence against the individual defendants by concluding that "a rational trier of fact could not find that the individual * * * defendants had notice of a pattern of unconstitutional acts and displayed deliberate indifference to or tacitly authorized the alleged unconstitutional conduct." Jane Doe "A", 682 F.Supp. at 455.

With respect to the evidence regarding the District's liability, the district court noted that there was, of course, no evidence of an official policy formulated by the District that authorized or condoned physical or sexual abuse of handicapped children. Likewise, the district court found that there was no evidence [**7] that Dr. Scarnato deliberately chose to follow a course of action of ignoring complaints regarding physical or sexual abuse of handicapped children. The district court found that because the individual defendants did not have notice of a pattern of unconstitutional acts and did not display deliberate indifference to or tacitly authorize the violation of plaintiffs' constitutional rights, no custom of deliberate indifference to or tacit authorization of the alleged unconstitutional conduct could be attributed to the District.

II. DISCUSSION

Summary judgment is appropriate "only when there is no genuine issue of material fact, so that the dispute may be decided on purely legal grounds." Holloway v. Lockhart, 813 F.2d 874, 878 (8th Cir. 1987). The district court is [illegible]quired to view the evidence in the light most favorable to the nonmoving party and to give that party the benefit of all reasonable inferences to be drawn from the underlying facts. Id.; Fed.R.Civ.P. 56.

Plaintiffs contend that a genuine issue of material fact exists with respect to whether the individual defendants failed to adequately respond to a known risk of physical and emotional harm presented by Cerny [**8] to plaintiffs.

The individual defendants are subject to personal liability only if it can be proved that they:

1) Received notice of a pattern of unconstitutional acts committed by subordinates;

2) Demonstrated deliberate indifference to or tacit authorization of the offensive acts;

3) Failed to take sufficient remedial action; and

4) That such failure proximately caused injury to the children.

See Wilson v. City of North Little Rock, 801 F.2d 316, 322 (8th Cir. 1986).

Plaintiffs contend that a genuine issue of material fact exists as to whether the District had a policy or custom of failing to adequately receive, investigate, and act upon prior complaints of Cerny's misconduct, a finding of which would be a prerequisite to the imposition of liability against the District. See Monell v. Dep't of Social Servs., 436 U.S. 658, 694 (1978).

Official policy involves "a deliberate choice to follow a course of action * * * made from among various alternatives" by an official who has the final authority to establish governmental policy. Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986). State law identifies which officials make policy. Id.; City of St. Louis v. [**9] Praprotnik, 485 U.S. 112, (1988). The district court found that under Missouri law the board of education of a special school district is the official policy maker, charged as it is with the responsibility of providing educational programs and transportation for handicapped children. Mo.Rev.Stat. @@ 162.855, 162.900.

[*646] For the District to be held liable on the basis of custom, there must have been a pattern of "persistent and widespread" unconstitutional practices which became so "permanent and well settled" as to have the effect and force of law. See Monell, 436 U.S. at 691. We have held that to establish the existence of a governmental custom or failure to receive, investigate, or act on complaints of violations of constitutional rights, a plaintiff must prove:

1) The existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees;

2) Deliberate indifference to or tacit authorization of such conduct by the governmental entity's policymaking officials after notice to the officials of [illegible]t misconduct; and

3) That plaintiff was injured by acts pursuant to the governmental entity's custom, i.e., that [**10] the custom was the moving force behind the

constitutional violation.

See Harris v. City of Pagedale, 821 F.2d 499, 504-07 (8th Cir.), cert. denied, 484 U.S. 986 (1987).

As to the individual defendants, we agree that the evidence, viewed in the light most favorable to plaintiffs, would not support a finding that the individual defendants had notice of a pattern of unconstitutional acts by Cerny or that they were deliberately indifferent to or tacitly authorized Cerny's alleged physical and sexual abuse of plaintiffs. Likewise, we agree with the district court that defendant Stotler at most was guilty of negligence in failing to respond to the October 1984 complaint regarding Cerny's alleged misconduct. As the district court noted, such negligence does not implicate fourteenth amendment protections. See Daniels v. Williams, 474 U.S. 327 (1986); Davidson v. Cannon, 474 U.S. 344 (1986). n4

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n4 Plaintiffs point to evidence that certain of the individual defendants had been made aware that in May or June of 1983 Cerny had made a homosexual proposition towards a deliveryman in the restroom on school premises; that in 1978 or 1979 he had made an inappropriate physical gesture towards a female employee of the District at a nightclub; and that at a 1979 Christmas party he had made a lewd gesture with his lips towards a female employee of the District. Whatever this evidence says with regard to Cerny's sexual relationships with adults, we do not believe that it constitutes the type of notice that could be held to impose section 1983 liability upon the individual defendants or the District.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[**11]

With respect to the District's liability, we agree with the district court that the evidence would not support a finding of the existence of a pattern of persistent and widespread unconstitutional practices that had become so permanent and well-settled as to have the force and effect of law. Because the individual defendants did not have notice of a pattern of unconstitutional acts and did not display deliberate indifference to or tacitly authorize the violation of the plaintiffs' constitutional rights, the district court was correct in holding that no custom of deliberate indifference to or tacit authorization of the alleged unconstitutional conduct could be attributed to the district. We agree with the district court that there was no evidence that Dr. Scarnato deliberately chose to follow a course of action of ignoring complaints regarding physical or sexual abuse of handicapped children.

Likewise, we conclude that the evidence does not establish the existence of a genuine issue of material fact on the question whether the District was guilty of deliberate indifference to the rights of the handicapped children in the District's training program for bus drivers, teachers, supervisors, [**12] and bus aides. Thus, the district court could not be held liable on this account. City of Canton v. Harris, 109 S.Ct. 1197 (1989).

To hold that the individual defendants and the District are not liable to plaintiffs is not to minimize Cerny's misconduct. That subsequent events proved him to be a sexual reprobate, however, should not result in after-the-fact imposition of the requirement of character-discerning omniscience on the part of the individual defendants [*647] or the District. Viewed in retrospect, some of Cerny's pre-arrest conduct portrays his true nature with a claritythat pre-arrest circumstances at the most only hinted at. If negligence could form the basis for a finding of liability, plaintiffs' showing might have been adequate to take the case to a jury. Measured against the deliberate indifference-official policy standard of liability, however, plaintiffs have failed to establish a submissible case. Accordingly, the district court did not err in granting summary judgment in favor of all defendants.

Plaintiffs contend that the district court abused its discretion in imposing a portion of the costs of litigation on plaintiffs' next friends. Costs in the amount of $ 15,148.26 [**13] were imposed by the district court on plaintiffs to reimburse the District and the individual defendants for deposition and copying costs. Although plaintiffs were allowed seven days to file a motion for reconsideration with respect to the indigent status of their next friends, they failed to do so. Accordingly, we conclude that the district court's order awarding costs did not constitute an abuse of discretion. See Poe v. John Deere Co., 695 F.2d 1103, 1108 (8th Cir. 1982), and Mo.Rev.Stat. @ 507.180. n5

- -Footnotes- -

n5 We have considered plaintiffs' contention that the district court erred in refusing to allow them to file a certain affidavit in support of their motion for reconsideration of the order granting summary judgment. The information contained in the affidavit was available prior to the entry of summary judgment, however, but was not submitted during the six months that the District's motion for summary judgment was pending. Accordingly, the district court properly denied the motion. See Hagerman v. Yukon Energy Corp., 839 F.2d 407, 414 (8th Cir.), cert. denied, 109 S.Ct. 63 (1988) (citing Rothwell Cotton Co. v. Rosenthal & Co., 827 F.2d 246, 251, as amended, 835 F.2d 710 (7th Cir. 1987)).

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[**14]

The district court's judgment is affirmed.

16TH CASE of Level 2 printed in FULL format.

D. T., a minor, by his legally appointed guardians; M. T.
and K. T. in their own behalf as parents and legal guardians
of D. T.; F. H., Jr. a minor, by his legally appointed
guardians; F. H. and L. T., in their own behalf as parents
and legal guardians of F. H.; P. M., a minor, by his legally
appointed guardian; R. T., in her own behalf as parent and
legal guardian of P. M., Plaintiffs-Appellees, v.
INDEPENDENT SCHOOL DISTRICT No. 16 of Pawnee County,
Oklahoma, Defendant-Appellant

Nos. 88-1619, 89-5077

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

894 F.2d 1176; 1990 U.S. App. LEXIS 788

January 25, 1990

PRIOR HISTORY: [**1]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA (D.C. No. 85-C-206-E).

COUNSEL: Frank A. Zeigler, Tulsa, Oklahoma, attorney for plaintiffs-appellees.

Edward J. Main (James K. Secrest, II on the briefs), of Secrest and Hill, Tulsa, Oklahoma, attorney for defendant-appellant.

JUDGES: Logan, Barrett and Ebel, Circuit Judges.

OPINIONBY: BARRETT

OPINION: [*1177] BARRETT, Senior Circuit Judge.

This appeal arises out of a civil rights action brought by the plaintiffs-appellees, three male elementary students seeking damages from the defendant-appellant, Independent School District No. I6 of Pawnee County, Oklahoma (School District) in connection with sexual acts committed against the plaintiffs by Stephen Lee Epps (Epps), a male teacher of School District, during summer vacation and in relation to fund raising for a summer basketball camp.

This 42 U.S.C. @ 1983 action was predicated upon a complaint that the School District was guilty of deliberate indifference or that it acted with reckless disregard of plaintiffs' constitutionally protected liberty/privacy interests in the hiring, supervision and investigation of Epps who sexually molested plaintiffs. The complaint charged that the wrongful [**2] conduct of the defendants constituted "[a] violation of the plaintiffs' Federal Constitutional and statutory rights of privacy, liberty, substantive due process, equal protection and is a violation of their Fourth Amendment right to be secure in their person and other rights protected by the First, Fifth, Ninth [*1178] and Fourteenth Amendments to the United States Constitution. . . . (R., Supp. Vol. I, Tab 1, p. 8). Further, the complaint alleged that the hiring of Epps was the "moving force" behind the sexual abuse practiced by Epps upon plaintiffs and was, accordingly, state action taken under color of state law.

isdiction was predicated on 28 U.S.C. @@ 1331 and 1343(a)(3) and 42 U.S.C. 1983.

The jury awarded damages of $ 42,000 each to D.T. and P.M. and $ 50,000 to F.H.

General Background

Prior to the commencement of the 1981 school term, Epps, then some thirty years of age, was hired to teach fifth grade and also coach the boys' basketball team at Terlton Elementary School, Terlton, Oklahoma. The application-screening interview process was conducted by Dr. Charles Clayton, Superintendent of the Cleveland, Oklahoma, Public Schools. Mr. Donald K. Daniels, [**3] Principal at Terlton Elementary School, participated in the interview of Epps with Dr. Clayton. Principal Daniels recommended to Dr. Clayton that Epps be hired, and Dr. Clayton made that same recommendation to the School District Board. For purposes of this litigation, Dr. Clayton and Principal Daniels were considered policy making officials representing the defendant-appellant School District.

In 1971, Epps had been, unbeknownst to Dr. Clayton or Principal Daniels, convicted of sodomy in Dallas County, Texas. His criminal file was maintained under the name of Steve Epps. Epps was on probation when hired to teach in 1972 at Houston Elementary School in Lancaster, Texas. He taught fourth and fifth grades there until 1977. When he was hired there, the school district did not ke specific inquiry of Epps about a criminal record because, under Texas law, e could not hold a teaching certificate if he/she had a criminal record. The ame was true in Oklahoma when Epps was hired in 1981.

Prior to the commencement of the school term in 1981 but after Epps had been hired, Dr. Clayton received a telephone call from Mrs. Diane Kelley, a cousin of Epps, from Phoenix, Arizona. Mrs. Kelley informed [**4] Dr. Clayton that Epps had visited her home in Phoenix that summer and had physically fondled her eleven-year-old son in his private parts.

Dr. Clayton considered the Kelley report as most serious. He proceeded to make a number of contacts and inquiries concerning Epps and requested that Principal Daniels make an investigation, including a personal confrontation with Epps concerning these charges. Principal Daniels did so, and Epps denied any wrongdoing. He claimed that Mrs. Kelley wanted him to remain in Phoenix at her home and that she made these charges because he did not stay with her.

During the fall of 1981, Principal Daniels was informed by two or three other individuals of similar rumors about Epps but no complaints had ever been lodged against Epps. Dr. Clayton requested that Principal Daniels keep close track of Epps. There were no additional rumors or reports of any kind adverse to Epps following those made in the fall of 1981. The incident between Epps and the three minor male plaintiffs occurred on June 13-14, 1984, when the three plaintiffs, each members of Epps' fifth grade class, went with Epps to Sand Springs and Tulsa, Oklahoma, to sell candy to raise money for summer [**5] sketball camp "scholarships" and stayed overnight at Epps' home.

Undisputed Facts

(Relative to the School District's Policy of Hiring and Supervising Teachers)

Dr. Clayton accepted applications for a position of fifth grade teacher and boys' basketball coach at the Terlton Elementary School, during the summer of 1981 for a contract term from August, 1981, to the end of May, 1982. (R., Supp. Vol. II, pp. 74-75). The application and selection process followed by Dr. Clayton was the normal, accepted procedure used in the State of Oklahoma (R., Supp. Vol. II, pp. 160-64). The first step in the procedure was that of notifying four or five universities or colleges in Oklahoma of the vacancy and advising [*1179] that applications would be accepted and screened (R., Supp. Vol. II, p. 74).

One of the applications received was from Epps who was then the Superintendent of Schools of Wann, Oklahoma. Id. The application form used in this case (just as all such forms in Oklahoma) did not contain any place thereon for reference to an arrest or criminal record because a teacher with a felony record cannot obtain or retain a teaching certificate from the State of Oklahoma. (Id. at 76; R., Supp. [**6] Vol. III, p. 1640; R. Supp. Vol. IV, p. 445). It was the policy of the school district, however, to ask "support" personnel whether they have been arrested. (R., Supp. Vol. III, p. 111). In the case of teachers, the school district relied on the certification process. Id.

The certificate relative to the Epps application, just as the certificates for all other applicants, came to Dr. Clayton from Oklahoma State University and contained confidential, complete information about the applicant's educational background, academic honors, and professional standing (R., Supp. Vol. II, p[illegible] 80). In addition, Dr. Clayton received from Oklahoma State University recommendations from college professors and principals-superintendents where Epps had taught or worked. Id. at 81. Dr. Clayton, prior to conducting the personal interview with Epps, conducted telephone interviews with those listed as recommenders. Id. at 81, 114. Both the certificate and recommendations were returned to Oklahoma State University following the personal interview of Epps conducted by Dr. Clayton and Principal Daniels. Id. at 82. The interview with Epps was conducted during the month of May, 1981, and lasted [**7] about one hour (R., Supp. Vol. III, p. 108). At the conclusion of the interview, Principal Daniels recommended to Dr. Clayton that Epps be hired. (R., Supp. Vol. IV, p. 444).

Dr. Clayton, who had served as Superintendent of the Cleveland Public Schools since 1979, and who supervises the entire educational program for the Cleveland schools, including principals (R., Supp. Vol. II, p. 73), recommended to the school board that Epps be hired as the fifth grade teacher and coach of boys' basketball at Terlton Elementary School for the school year September 1, 1981, to June 1, 1982 (R., Supp. Vol. III, pp. 104, 168-69). Terlton, Oklahoma, is a small town with a population not exceeding 300 persons. (R., Supp. Vol. V, p. 567).

A person convicted of a felony in Oklahoma cannot have a teaching certificate. (R., Supp. Vol. III, p. 164) (testimony of Dr. Clayton); (R., Supp. Vol. IV, p. 445) (testimony of Principal Daniels). Martin Allen Brown, a private investigator employed by the plaintiffs, testified that in checking the cour[illegible] records of Dallas County, he was only able to locate the Epps "sodomy case" f[illegible]e by using a computer and referencing to the name "S" Epps which directed him to a 1971 [**8] conviction of one Steve Epps. (R., Supp. Vol. III, pp. 197-99).

[illegible] agreed that if the name Stephen Lee Epps had been used in the computer search that it would not have shown the conviction. Id. at 213. Furthermore, in 1981, there was no computer system available to conduct such an inquiry and it would have been a matter of diligence and competency of any person working in the clerk of court's office to equate the file of Steve Epps to Stephen Lee Epps. Id. at 208-09.

On or about August 11, 1981, Mrs. Diane Kelley of Phoenix, Arizona, mother of three minor children, phoned Dr. Clayton at his office in Cleveland, Oklahoma (R., Supp. Vol. II, p. 42, 116). Mrs. Kelley related that Epps, her cousin, had recently visited at her home in Phoenix and that Epps had physically fondled her eleven year old son in his private parts and that she was very afraid of the situation because she learned that Epps was to teach in Oklahoma. (R., Supp., Vol. II, p. 42, 55; R., Supp. Vol. III, p. 116). Dr. Clayton's notes indicate that Mrs. Kelley may have referred to Epps as a child molester. Dr. Clayton treated Mrs. Kelley's inquiry as most serious, (R., Supp. Vol. III, p. 124), because in the [**9] course of his more than 30 years in the educational system, he had never experienced a teacher who was a child molester. Id. at 127. Dr. Clayton informed Mrs. Kelley that he would get in [*1180] touch with Epps' principal and conduct a full investigation, (R., Supp. Vol. II, p. 45).

Following the call from Mrs. Kelley, Dr. Clayton first contacted Principal Daniels and asked him to make personal contact with Epps concerning the Diane Kelley allegations. (R., Supp. Vol. III, p. 112; R. Supp. Vol. IV, p. 360). Principal Daniels had been in the school system for some 35 years and had observed abused or sexually abused children. Id at 366. Principal Daniels did confront Epps with the allegations made by Mrs. Kelley and spoke with him at length about the matter. Epps denied touching Mrs. Kelley's child, absolutely denied that he was a homosexual and claimed that the reason Mrs. Kelley made the call and leveled the charges was because she was mad that he left Arizona. Epps claimed that Mrs. Kelley wanted him to stay with her and not to return to Oklahoma. Id. at 377, 378. Principal Daniels considered that to be a plausible explanation and was personally convinced that Epps would not [**10] harm children. Id. at 379, 381.

Dr. Clayton testified that he also pursued the following inquiries in order to check out the serious allegations made by Mrs. Kelley:

(1) He phoned Larry Ferguson of Cleveland, Oklahoma, who was then serving as president of the board of education and notified him of the call received from Mrs. Kelley (R., Supp. Vol. III, pp. 116-17). Ferguson related that it would be necessary to "double check" the places of Epps' prior employment but that he was not too concerned because Epps was then dating a female teacher in Cleveland (R., Supp. Vol. IV, pp. 562-63).

(2) Dr. Clayton phoned Ben Lacy, principal of Drumright, Oklahoma, School (R., Supp. Vol. III, p. 120). He had already received good reports from Lacy relative to Epps' work at Drumright during the interview screening process. Id. at p. 168. When Dr. Clayton advised Lacy of Mrs. Kelley's charges, Lacy stated that he had heard rumors about Epps concerning child abuse and that one board member, Peggy Pruitt, had informed him that she had heard rumors to the effect that Epps was a homosexual. Id. at 147.

(3) Dr. Clayton next phoned Glenn Thompson Jones, of Lancaster, Texas, Principal of Houston [**11] Elementary School where Epps served as a

fourth and fifth grade teacher from August, 1972, to June of 1977 (R., Supp. Vol. III, pp. 120-21; R., Supp. Vol. IV, p. 495). Dr. Clayton related the information received from Mrs. Kelley to Jones including the report that Epps had been fired there. Jones related that he had no knowledge of a sexual molestation or abuse of children incident involving Epps before Epps was hired at Houston Elementary School, and that he knew of no incident involving Epps and young children during the five years Epps taught at Lancaster. (R., Vol. IV, pp. 496-97). Jones informed Dr. Clayton that Epps did a good job there, that he would hire Epps back if he applied for a job and that Epps left on his own (R., Supp. Vol. III, p. 121; R., Supp. Vol. V, pp. 496-97). Principal Daniels also phoned Jones and he, too, was told that Epps had not been fired from his teaching job at Lancaster and that he could have retained his job if he had desired. (R., Supp. Vol. III, p. 384).

(4) Dr. Clayton also phoned the Wann, Oklahoma, elementary school and again obtained a very favorable report and recommendation concerning Epps. (R., Supp. Vol. III, pp. 167-68).

With the report [**12] from Principal Daniels concerning his conference with Epps and the lack of any credible evidence of acts of child molestation or homosexuality on the part of Epps, Dr. Clayton believed that he had done everything reasonable to investigate the matter under the circumstances (R., Supp. Vol. III, p. 124). Dr. Clayton requested that Principal Daniels watch Epps closely (R., Supp. Vol. IV, p. 360).

Principal Daniels testified that he did watch Epps closely, by spontaneous visits to his classroom, going to basketball practices and games, and seeing Epps every school day. Id. However, he never observed Epps touching young school boys in any unusual manner. Id. at 362. Principal Daniels wrote six formal evaluations of [*1181] Epps' performance as a teacher at Terlton Elementary School from 1981 until 1984 (three school years) and placed Epps in the highest category. Id. at 362-65. He testified that he heard no rumors about Epps beyond those that he had heard in 1981 and could find no basis to support them. Id. at 376.

Principal Daniels also testified that he was contacted by Mrs. Charlotte Johnson during the fall of 1981 and that she told him about rumors that Epps was homosexual [**13] and that she indicated a concern that he would harm children. (R., Supp. Vol. III, p. 216; R., Supp. Vol. IV, p. 370). Mrs. Johnson did not know of any incidents involving Epps. Id. at 371. Principal Daniels told Mrs. Johnson about a week later that he couldn't find any evidence on Epps (R., Supp. Vol. III, p. 217). Principal Daniels testified that he took such rumors seriously and in his opinion the only thing more serious would be murder. (R., Supp. Vol. IV. p. 387). This rumor was relayed to Dr. Clayton by Principal Daniels (R., Supp. Vol. III, p. 149). Principal Daniels testified that the "rumors" concerning Epps died down because there were no incidents during the three school years he taught at Terlton. (R., Supp. Vol. IV, p. 392).

When Mrs. Kelley phoned Dr. Clayton during the spring of 1982, he informed her that Epps was getting along fine, that "we" had no problems with him and that Epps was dating a female teacher (R., Supp. Vol. III, p. 126). Dr. Clayton testified that he "probably" concluded that Mrs. Kelley was in error concerni any problem Epps may have had in Dallas, Texas. Id. at pp. 126-27. He testifi that nobody made any references concerning any improprieties [**14] between Epps and young boys during the three years he taught at Terlton Elementary

School (R., Supp. Vol. III, p. 114).

Walter C. Potts testified that he served as custodian of Terlton Elementary School and that in August, 1981, he told Principal Daniels that one of the school maintenance supervisors had seen Epps and remarked that Epps had been run out of Drumright "for fooling around with them little boys." (R., Supp. Vol. III, pp. 192-93). Principal Daniels in turn related this rumor to Dr. Clayton who in turn checked the rumor out with Mr. Lacy, the principal, and other school officials at Drumright (R., Supp. Vol. IV, p. 371). Lacy informed Dr. Clayton that he had heard rumors about Epps but that no official complaints had been made (R., Supp. Vol. III, p. 147). Dr. Clayton conveyed the remarks by Lacy and rumors conveyed by Peggy Pruitt to the school board. Id. at 146-47.

Mrs. Debbie Hewitt, mother of Nathan Hewitt who was a student in Epps' class at Terlton Elementary School in 1981-82, was concerned about rumors that Epps wanted to "spend time with my son" and reported this to Principal Daniels who said he would check it out (R., Supp. Vol. IV, 352-54). She stated that [**15] on a follow-up visit, Principal Daniels stated that he could not find out anything. Id. at 355. Principal Daniels has no recollection of a visit with Mrs. Hewitt in May, 1982, concerning the rumor that Epps may be a pedophile. Id. at 358.

Dr. Clayton testified that the first information he had concerning Epps' conviction in Texas came in July, 1984, when Epps was charged in Oklahoma and that he had been told the Texas criminal record had been expunged. Id. at 78. In retrospect, Dr. Clayton acknowledged that it would have been advantageous had he been informed of Epps' criminal record. Id.

Disputed Evidence

(Relative to the School District's Policy of Hiring and Supervising Teachers)

Mrs. Kelley testified that in addition to advising Dr. Clayton of Epps' fondling of her son, she also told Dr. Clayton that she had learned that Epps had been arrested in Dallas for a similar incident (R., Supp.Vol. II, p. 44). Mrs. Kelley also testified that she obtained Principal Daniels' name about two or three days after speaking with Dr. Clayton and that she repeated to Principal Daniels what she had told Dr. Clayton. Id. at 47. Mrs. Kelley testified that she asked Principal [**16] Daniels to call her back about the outcome of his investigation into the situation, but she called him instead and Principal [*1182] Daniels stated to her that he had a personal conference with Epps, found that Epps was dating a female and that everything seemed to be all right. Id. at 48, 49, 60-61. Mrs. Kelley stated that she recalled informing Dr. Clayton that her family had related to her that Epps had been arrested in Texas. Id. at 58. She acknowledged that she was upset when she phoned Dr. Clayton and that she may have stated that she had been told that Epps was fired from his job in Texas for "being a child molester" as opposed to relating that he had been arrested. Id. at 59.

Dr. Clayton testified that when Mrs. Kelley phoned him on August 11, 1981, he treated her call as a serious inquiry both because of the allegation concerning Epps' fondling of her 11-year old son and also because she had related that her mother had informed her that Epps had been fired from the Dallas school. (R., Supp. Vol. III, pp. 116, 118) Dr. Clayton testified, however, that Mrs. Kelley definitely did not inform him that Epps had been arrested in Dallas. Id. at 1 121. Dr. Clayton testified [**17] that if Mrs. Kelley had told him that Ep had been arrested, he would probably have contacted law enforcement officers (R., Supp. Vol. III, p. 185).

Principal Daniels testified that he did not at any time receive a call from Mrs. Diane Kelley, (R., Supp. Vol. IV, p. 358-59), and that Dr. Clayton advised him of the call received from Mrs. Kelley and of the allegation of sexual misconduct by Epps toward Mrs. Kelley's minor son and the report that Epps had been fired from a school in Texas. Id. at 358-59. He was never advised that Epps had been arrested in Dallas. Id.

Richard A. Lewis, a private investigator employed by the defendants, testified that he spoke by telephone with Mrs. Diane Kelley on May 6, 1987, and that she related that she had made two or three calls to Dr. Clayton, whom she referred to as the principal (R., Supp. Vol. IV, p. 534). Lewis had no recollection that Mrs. Kelley ever stated that Epps had ever been criminally charged. Id. at 549.

Mrs. G.T., mother of D.T., one of the Terlton Elementary School boys molested by Epps, testified that after the incident she and Mrs. L.H., mother of one of the plaintiffs, called upon [**18] Dr. Clayton and that he told them he was shocked about the incident and that Epps had been suspended and would not be in the school system any longer (R., Supp. Vol. III, p. 228) She testified that when she and Mrs. Baker returned to Dr. Clayton's office a few days later, he told them that they were troublemaking parents and that Principal Daniels was a good principal. Id. at 229. Dr. Clayton denied ever telling the mothers that they were troublemaking parents. Id. at 157. Dr. Clayton testified that when learned of the child molestation incident involving Epps and three of his mal students at Terlton Elementary School that he invited all of the mothers of the children to come to his office, which they did, and that he offered the school guidance center and advised them that he would meet with them again that week. Id. at 156-57. He did meet with them two days later. Id.

Undisputed Evidence

(Relative to the Summer Basketball Camp and Solicitation of Funds for Attendance at the Camp)

Epps was hired to teach the fifth grade and be the boys' basketball coach at Terlton Elementary School commencing with the school year 1981. (R., Supp. Vol. III, p. 170). Epps was [**19] hired on a year-to-year basis commencing in late August to the end of May. Id. at 171. Epps had no duties or obligations under his contract as a teacher and coach after the school term ended in May until it commenced again in late August of each year (R., Vol. III, pp. 467-69). Epps received his checks for the summer months sometime toward the end of May each year when he completed his work (R., Supp.Vol. IV, pp. 402-03). Epps taught and coached at Terlton Elementary School for three years. Id. at pp. 357-58.

For some years prior to 1984, a short summer "basketball camp" had been held at Oklahoma State University for elementary grade school children, operated by persons [*1183] independent of regular school functions. (R., Supp.Vol. IV, pp. 395-96). During the summer of 1984, however, the basketball camp was operated and directed by Larry Warden (Coach Warden), who worked during the regular school term as the girls' basketball coach at the Cleveland hools. The camp was to be held the summer of 1984 at the Cleveland High School facilities. (R., Supp.Vol. III, pp. 179-81; R., Supp.Vol. IV, pp. 461-63). This function was approved by the school board on May 7, 1984 (R., Supp.Vol. [**20] III, p. 179) under arrangements with Coach Warden whereby he agreed to provide insurance and many other things (R., Supp.Vol. IV, pp. 462-63). There is nothing in the record demonstrating that the school district sponsored, organized or managed the basketball camp. Principal Daniels testified that there are various summer basketball camps throughout the State of Oklahoma which cost the participants various amounts of money and that they are voluntarily attended. Id. at 464.

A "notice" or "flier" concerning a basketball game to be played at the outdoor basketball court at Terlton Elementary School in May, 1984, was prepared by Coach Warden, and circulated to the students at the school. The circular announced that a game would be played between the parents and the children to raise money to send basketball players who could not afford the admission fee to the camp (R., Supp.Vol. IV. pp. 392-93; R., Supp.Vol. III, pp. 179-80). Principal Daniels explained that the Terlton Elementary School is a small school, that there is no newspaper in the community and that there are many activities where the primary notice is a bulletin concerning the volunteer fire department, water board [**21] meetings, Girl Scouts, etc., distributed to the children at school to take home to their parents (R., Supp.Vol. IV. pp. 392-94). Principal Daniels stated that because there were so few people in Terlton who subscribed to the Cleveland newspaper, in order to reach the majority of people in the community, distribution of notices through the school students was one avenue used. Id. The Terlton Elementary School lding was used for various community activity meetings, such as volunteer fire department, summer basketball programs, Girl Scouts, Boy Scouts, and Brownies. Id.

The outdoor basketball game played at the Terlton Elementary School playground during one evening in May, 1984, was not organized, sponsored or promoted by the school. Id. at 464. Parents and other volunteers worked at concessions during the basketball game. Id. at 396. The school did not contribute any money to the game or to the summer basketball camp or to any student who wished to attend. Id. at 460-64. None of the proceeds from the game went to Terlton Elementary School. Id. at 460. Mrs. Linda Hightower, Jr., testified that she found out after this game that it was not sponsored by the [**22] school. (R., Supp.Vol. III, p. 266).

Another "flier" or "notice" prepared by Coach Warden was also distributed at Terlton Elementary School advising that a summer basketball camp would be held at Cleveland High School. Id. at 395. Larry Ferguson, former member of the Cleveland School Board, testified that the school board has never approved or sanctioned any activity to raise money for grade school children to attend summer basketball camp (R., Supp.Vol. III, p. 568).

Principal Daniels testified that he spoke with Epps on several occasions in 1983 and 1984 about activities involving raising money for the summer basketball camps and explained that the summer basketball camps could not be a school activity and whatever Epps did in that regard would be "as a volunteer in the munity," (R., Supp.Vol. IV, p. 400), and that he would not be doing it as a school basketball coach. Id. Principal Daniels testified that he had no knowledge that Epps and the three plaintiffs were together to sell candy for basketball camp on June 13-14, 1984. Id. at 401.

On June 13, 1984, Epps took the three minor children, all members of the Terlton Elementary School basketball team, ages 11, [**23] 11 and 13 respectively, (R., Supp.Vol. III, p. 94), to Sand Springs and Tulsa, Oklahoma, to sell candy to raise money for the summer basketball camp. Id. at 236. The [*1184] three minor children had their parents' permission to go with Epps to sell the candy. Id. at 236, 282, 295. The three minor children also had permission from their parents to spend the night with Epps. Epps sexually abused each of the plaintiffs during the June 13-14, 1984, time period.

There is no relevant disputed evidence in the record relating to the summer basketball camp and solicitation of funds for attendance at the camp.

Jury Verdict -- Court Instructions -- Interrogatories

The district court, early during the trial, observed that "[The] issue in this case is whether there was a policy followed by the defendant which resulted in these acts being committed and allowing these acts to be committed. We are not trying a negligence case . . . we are trying a 1983 case." (R., Supp.Vol. III, p. 139). Again, during trial, the court gave the following limiting instruction:

> This is a civil rights case rather than a negligence case. The plaintiffs claim that the defendant's actions deprived them of their constitutional [**24] rights. In order for a school district to be liable for depriving a person of his civil rights, it must have established an official policy which caused the deprivation. To constitute official policy the policy need not be i writing. However, the policy must be a deliberate choice of an employee of th school district and that employee must be responsible for establishing fina policy with respect to the subject matter in question.

Id. at 188.

After the defendant moved for a directed verdict following the plaintiffs' case, counsel for the defendant argued that the evidence simply did not support the proposition that Dr. Clayton and/or Principal Daniels had displayed reckless disregard or deliberate indifference to the constitutional rights of the plaintiffs in the hiring of Epps (R., Supp.Vol. IV, pp. 419-23). Further, counsel for the defendant argued that even should the court find deliberate indifference in the hiring of Epps by the defendant, still the plaintiffs must show that this was the "but for" leading to the molestation incidents of June 13-14, 1984. Id. at 422. Counsel for defendant argued that, as a matter of law, the acts committed by Epps on the plaintiffs [**25] on June 13-14, 1984, were not committed by an employee of the school district but rather as a private individual because Epps was not then acting for the defendant as a teacher or coach. Id. at 424.

The district court observed that it had come very close to sustaining a motion for summary judgment filed by defendants on the pleadings, but that the court was now satisfied that the policy issues should go to the jury, id. at 427, and that reasonable men could differ as to whether the investigation conducted by the school district was totally inadequate and could rise to th level of reckless disregard or deliberate indifference. Id. at 434. The motio for directed verdict was denied.

The motion for directed verdict was renewed by the defendant at the conclusion of all evidence and denied by the court (R., Supp.Vol. V, pp. 582-83). The court informed counsel that it was finding that the defendant was acting under color of some law of the State of Oklahoma and that the jury would be so instructed. Id. at 587. The court also informed counsel that an instruction would be given that "[the] liberty of the individual which the federal Constitution thus secures and protects [**26] includes freedom from unjustified intrusions on personal security including physical injury." Id. at 588.

The district court, following closing arguments by counsel, instructed the jury, inter alia, that:

> Plaintiffs claim that the defendant school district implemented a policy concerning the hiring, supervision and investigation of complaints concerning teacher sexual misconduct which showed deliberate indifference to the plaintiffs' constitutional rights. As a result of the alleged deprivation, plaintiffs claim that they sustained physical, emotional and monetary damages.
>
> [*1185] The defendant denies that its actions showed a policy of deliberate indifference to the complaints of sexual misconduct by teachers, either in hiring of teachers or in supervision of teachers.
>
> The plaintiff [sic] also denies that its actions were the cause of the plaintiffs' injuries and claims that plaintiffs' injuries were caused by the criminal acts of Stephen Lee Epps.

(R., Supp.Vol. VI, pp. 661-62).

Further, the district court instructed:

> [Plaintiffs'] cause of action . . . against defendant is brought under Title 42, United States Code, Section 1983 which states: [recital of statute omitted] [**27]
>
> In order to prove plaintiffs' claim the burden is upon the plaintiffs to establish by a preponderance of the evidence in the case the following facts:
>
> First, that a policy making employee of the defendant, with responsibility for establishing final policy with respect to the subject matter in question, made a deliberate choice to follow a course of action, which through reckless disregard or deliberate indifference to the plaintiffs' rights, operated to deprive plaintiffs of one or more of plaintiffs' federal constitutional rights.
>
> Second, that such defendant then and there acted under color of some law of the State of Oklahoma.
>
> And third, that such policy was the moving force behind the constitutional deprivation and consequent damage to the plaintiffs.

Id. at pp. 667-68.

The district court further instructed the jury that the Fourteenth Amendment to the federal Constitution provides that no state shall deprive any person of his liberty without due process of law, and that this includes freedom from unjustified intrusions on personal security including physical injury. Id. at 669.

The court instructed that, as a matter of law, Dr. Clayton and Principal Daniels were acting under [**28] color of state law, id. at 670, and:

> You are further instructed that you need not determine whether Stephen Lee Epps was acting under color of state law at the time of the criminal acts which occurred. The issue in this case is not whether Epps was acting as an official of the state, but whether there was a policy in existence of the defendant which constituted deliberate indifference to or reckless disregard for the rights of the plaintiffs and, if so, whether such policy was the moving force behind a constitutional deprivation. Id. at 670-71.
>
> [You] are instructed that the particular policy established by the defendant must be the moving force behind the constitutional violation and that plaintiffs must prove by a preponderance of the evidence that an affirmative link exists between that particular constitutional violation alleged and the policy.

Id. at 673.

Neither party lodged any objections to the instructions given.

In conjunction with the jury verdict awarding damages to the three plaintiffs, supra, the jury responded "yes" to each of the following special interrogatories:

> (1) Did the plaintiffs prove by a preponderance of the evidence that Dr. Clayton was [**29] the policy making employee of the defendant with the responsibility for establishing final policy with respect to the hiring, investigation, and supervision of teachers at Terlton Elementary School? Yes.
>
> (2) Did the plaintiffs by a preponderance of the evidence [prove] that Dr. Clayton made a deliberate choice to follow a course of action which constituted a policy of reckless disregard or deliberate indifference to plaintiffs' rights? Yes.
>
> (3) Did plaintiffs prove by a preponderance of the evidence that Principal Daniels was a policy making employee of the defendant with responsibility for establishing final policy with respect to investigation and supervision of teachers at Terlton Elementary School? Yes.
>
> (4) Did the plaintiffs prove by a preponderance of the evidence that Principal Daniels made a deliberate choice to follow [*1186] a course of action which constituted a policy of reckless disregard or deliberate indifference to plaintiffs' rights? Yes.
>
> (5) Did the plaintiffs prove by a preponderance of the evidence that the policy of the defendant was the moving force behind the deprivation of plaintiffs' constitutional rights? Yes.

(R., Supp.Vol. VI, pp. 679-80).

Contentions on Appeal [**30]

On appeal, the defendant contends that the judgment must be reversed because (1) there was no action taken "under color of law" required pursuant to 42 U.S.C. @ 1983 because Epps was not acting under color of state law when he molested the plaintiffs, (2) the defendant School District may not be held liable because there was no "state action" involved when the plaintiffs were sexually molested by Epps, (3) the defendant School District did not have a policy of deliberate indifference or reckless disregard of the plaintiffs' rights, (4) any policy or custom adopted by the School District was not the moving force behind any deprivation of rights, (5) the plaintiffs were not deprived of a constitutionally protected right, and (6) the trial court erred in failing to direct a verdict for the School District.

I.

Appellant School District contends that the events giving rise to this litigation are not events for which the School District should be held responsible under 42 U.S.C. @ 1983, citing to Paul v. Davis, 424 U.S. 693 , 47 L. Ed. 2d 405 , 96 S. Ct. 1155 (1976) for the proposition that a plaintiff must show (1) that he has been deprived of a right secured by the Constitution of the United States, and (2) that such [**31] deprivation was achieved under color of state law. School District cites United States v. Classic, 313 U.S. 299, 326 , 85 L. Ed. 1368 , 61 S. Ct. 1031 (1941) wherein the Supreme Court defined action taken "under color of law" as "[misuse] of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." (Brief of Appellant, p. 10). The School District easons that there was no state action involved in the events of June 13-14, 4, when Epps molested the plaintiffs. Instead, argues the School District, n point of fact, those events were the product of a private individual acting in his private capacity in connection with a private activity that the plaintiffs voluntarily and freely participated in as private individuals." (Reply Brief of Appellant, No. 88-1619, p. 10). We agree.

42 U.S.C. @ 1983 provides, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state . . . subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action [**32] at law, suit in equity, or other proper proceeding for redress.

Acts of a state officer in the ambit of his personal pursuits are not acts under color of state law. Screws v. United States, 325 U.S. 91 , 89 L. Ed. 1495 , 65 S. Ct. 1031 (1945). A state, its agencies or officials may not be assessed liability for the acts of a private individual, except by a "fair attribution" of those actions to the State. Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 936-37 , 73 L. Ed. 2d 482 , 102 S. Ct. 2744 (1982). It is uncontested in our case that on June 13-14, 1984, Epps was under no obligation to the School District. He was then on his free or summer "vacation." As such, he had no duties or obligations owing to or functions to perform for the School District. His contract required only that he teach fifth grade and coach boys' ketball at Terlton Elementary School commencing late August and continuing the end of May of each school year. Principal Daniels made it plain to Epps that any and all activities associated with summer basketball camps were not school related.

Beyond this, the thread connecting the School District to the 1984 summ basketball camp to be held at Cleveland High School under the sponsorship, control, and [*1187] management of Coach [**33] Warden, under a contract arrangement, was much too thin to constitute the basketball camp a sponsored activity of the School District. The only affirmative connections are to be found in: (a) the resolution adopted by the School District approving the use by Coach Warden of the Cleveland High School facilities for the conduct of the basketball camp, (b) the permitted distribution of fliers or notices concerning the summer camp among the school children attending Terlton Elementary School, and (c) the consented use of the outside basketball court by parents, children and others interested in raising funds for children who could not otherwise afford the cost of attending the summer basketball camps.

The above scenario involving the summer basketball camp constitutes the only possible nexus tying the School District to the off-duty, private action taken by Epps to organize the June 13-14, 1984, meeting with the plaintiffs to sell candy in order to raise money for the summer basketball camp. There is no argument that Epps was not under any obligation or duty to the School District during the "summer" vacation. No contention is made that the School District even knew that Epps and the [**34] plaintiffs planned the candy selling activities.

The obvious purpose of Congress in the enactment of @ 1983 was to provide a remedy to parties deprived of constitutional rights by a state official's abuse of his position while acting under color of state law. The deprivation in the case at bar involved the sexual molestation actions practiced by Epps upon th plaintiffs June 13-14, 1984. It is a given that the School District cannot liable to the plaintiffs for Epps' actions on a respondeat superior theory. Monell v. Department of Social Services, 436 U.S. 658 , 56 L. Ed. 2d 611 , 98 S. Ct. 2018 (1978). That case provides that a municipality is liable for constitutional torts only if the alleged unconstitutional acts implement a policy, ordinance or custom of the local government. Id. at 694 ("[it] is when execution of a government's policy or custom . . . inflicts the injury that the government as an entity is responsible under @ 1983.")

In Rizzo v. Goode, 423 U.S. 362 , 46 L. Ed. 2d 561 , 96 S. Ct. 598 (1976), the Supreme Court held that municipalities and their supervisory personnel are not liable for civil rights violations caused by individual police officers employed by the municipalities unless the plaintiff demonstrates "[an] [**35] affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy -- express or otherwise -- showing their authorization or approval of such misconduct." Id. at 371. (Emphasis supplied). In other words, it is the obligation of the plaintiff to prove that there exists a direct nexus between the constitutional torts (here the acts of sexual molestation practiced by Epps upon the plaintiffs on June 13-14, 1984) and the School District's authorization or approval thereof, either expressly or otherwise, by the adoption of any plan or policy. In the instant case, there is absolutely nothing in the record demonstrating that the School District had any control over Epps during the summer months. Epps had no duties or obligations to perform on behalf of the School District during the summer months. Further, the School District did not sponsor or approve the activities undertaken by Epps and the plaintiffs on June 13-14, 1984, i.e., t sell candy in order to raise money for attendance at the summer basketball ca

The district court permitted the jury to treat the School District's procedure in hiring teachers as the "policy" which, [**36] if found to be so wanting in its investigative methods in Epps' case as to demonstrate reckless disregard or deliberate indifference to the plaintiffs' constitutional rights, to serve as the required "nexus." Thus, under the court's instructions, Dr. Clayton and Principal Daniels -- and not Epps -- were the "state actors" on June 13-14, 1984, and the issue for jury resolution was whether their conduct (and accordingly that of the School District) in the procedure employed in the investigation, hiring, and supervision of Epps as a teacher and coach at Terlton Elementary School was the affirmative link [*1188] required under Rizzo v. Goode, supra. We hold that the district court clearly erred in so instructing.

Epps was, on June 13-14, 1984, acting in a status similar to that of an "off duty" policeman, except that Epps was absolutely free from all obligation or duty to School District. Thus, the "nexus" is much more tenuous in this case than that of an "off duty" police officer. We reject plaintiffs' contention that the deprivations in this case are fairly attributable to state law because of the "cloak of authority" held by a teacher: "This authority is not limited to the classroom or to [**37] the school year, but rather, in the case of a coach, extend to extra curricular activities. Just as a policeman is the legal authority figure for adults, a teacher represents the first authority figure to young children." (Brief of Appellee, No. 88-1619, p. 8). If the "extra curricular" activity had a real "nexus" to the duties and obligations owing by Epps to School District, we would agree with plaintiffs. However, such is simply not the case. Here, the plaintiffs voluntarily participated with Epps in basketball camp fund-raising activities which were not related to school activities, and thus, not undertaken under color of state law.

The School District could be held liable in this case under @ 1983 only if plaintiffs demonstrated a direct causal connection between the hiring, investigative, and supervising policy in question and the alleged constitutional deprivation. City of Canton, Ohio v. Harris, 489 U.S. 378, 109 S. Ct. 1197 , 103 L. Ed. 2d 412 (1989) ("Moreover, for liability to attach in this circumstance the identified deficiency in the city's [police] training program [policy] must be closely related to the ultimate injury. Thus, in the case at hand, respondent must still [**38] prove that the deficiency in training actually caused the police officers' indifference to her medical needs." 109 S.Ct. at 1206.) (emphasis supplied).

In Springfield v. Kibbe, 480 U.S. 257, 267, 268 , 94 L. Ed. 2d 293 , 107 S. Ct. 1114 (1987) (O'Connor, J., dissenting) observed :

> Given the importance, under @ 1983, of distinguishing between direct and vicarious liability, the Court repeatedly has stressed the need to find a direct causal connection between municipal conduct and the constitutional deprivation. See e.g., Oklahoma City v. Tuttle, 471 U.S. at 824-25, n. 8 (requiring 'affirmative link' between municipal policy and constitutional violation); Polk County v. Dodson, 454 U.S. 312 , 70 L. Ed. 2d 509 , 102 S. Ct. 445 (1981) (municipal policy must be the 'moving force' behind constitutional deprivation) . . . . When the execution of municipal policy does not compel a constitutional violation, however, the causal connection between municipal policy and the deprivation of constitutional rights becomes more difficult to discern. In some sense, of course, almost any injury inflicted by a municipal agent or employee ultimately can be traced to municipal policy.

Where a claim is based on the Due Process Clause of the Fourteenth Amendm [**39] (as here), the Supreme Court has held that such does not transform every tort committed by a state actor into a constitutional violation. Daniels v. Williams, 474 U.S. 327, 335-36 , 88 L. Ed. 2d 662 , 106 S. Ct. 662 (1986) ("Jailers may owe a special duty of care to those in their custody under state tort law, see Restatement (Second) of Torts @ 314A(4) (1965), but for the reasons previously stated we reject the contention that the Due Process Clause of the Fourteenth Amendment embraces such a tort law concept."); Martinez v. California, 444 U.S. 277, 285 , 62 L. Ed. 2d 481 , 100 S. Ct. 553 (1980) ("Her life was taken by the parolee five months after his release . . . the parole board was not aware that appellants' decedent, as distinguished from the public at large, faced any special danger . . . we do hold that at least under the particular circumstances of this parole decision, appellants' decedent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law."); Baker v. McCollan, 443 U.S. 137, 146 , 61 L. Ed. 2d 433 , 99 S. Ct. 2689 (1979) (holding that the tort [*1189] of false imprisonment does not become a violation of the Due Process Clause of the Fourteenth Amendment simply because the defendant is a state official [**40] and that "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law."); Paul v. Davis, 424 U.S. 693, 701 , 47 L. Ed. 2d 405 , 96 S. Ct. 1155 (1976) ("Rather, he apparently believes that the Fourteenth Amendment's Due Process Clause should ex proprio vigore extend to him a right to be free of injury whenever the state may be characterized as the tortfeasor. But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states.

In Pembaur v. City of Cincinnati, 475 U.S. 469, 479-80 , 89 L. Ed. 2d 452 , 106 S. Ct. 1292 (1986), the Supreme Court observed that the touchstone for determining "official policy" is by distinguishing "acts of the municipality from acts of employees of the municipality, and thereby making clear that municipal liability is limited to action for which the municipality is actually responsible." And Pembaur makes it clear that the policy must be a deliberate choice of action "with respect to the subject matter in question." Id. at 483-84. (Emphasis supplied). The subject matter "in question" in the instant case is the alleged deprivation [**41] of constitutional rights of the plaintiffs (rights of liberty and privacy) which occurred June 13-14, 1984.

In City of St. Louis v. Praprotnik n1 , supra, a plurality of the Supreme Court held that a municipality cannot be liable under @ 1983 unless the final policy maker, as identified by statute (in our case Dr. Clayton or Dr. Clayton and Principal Daniels) is the one who takes the unconstitutional action. In the instant case, there can be no question but that the "unconstitutional action" charged against the defendants were the coerced acts of sexual molestation practiced upon the plaintiffs by Epps on June 13-14, 1984, alleged by plaintiffs to have resulted by virtue of the School District's willful disregard or deliberate indifference to the plaintiffs evidenced in its policy of hiring, investigation, and supervision of Epps, which plaintiff's pleaded to have established "[a] causal connection between the acts of Epps and the conduct of District." (R., Supp.Vol. I, Tab 1, Complaint, p. 7). Like the Supreme Court holding in Martinez v. California, supra, we hold that the acts of molestatio practiced by Epps upon the plaintiffs on June 13-14, 1984, constituted too [**42] remote a consequence of the 1981 hiring and investigation policy to impose liability upon the School District under the civil rights law.

-Footnotes-

n1 In City of St. Louis v. Praprotnik, 485 U.S. 112 , 99 L. Ed. 2d 107 , 108 S. Ct. 915 (1988) (plurality opinion), the Supreme Court held that the trial court must identify those officials who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the alleged constitutional deprivation or violation. Once the court has identified those officials who have the authority to make official policy decisions, it is then the duty of the jury to determine whether those policy decisions caused the deprivation of constitutional rights. In the case at bar, the district court, without the benefit of Praprotnik, permitted the jury to make both findings/determinations. This was error. However, no objections were lodged and, in our view, the error was harmless because the court specially instructed that Dr. Clayton and Principal Daniels were acting under color of state law.

-End Footnotes-

In Stoneking v. Bradford Area School Dist., 882 F.2d 720 (3rd Cir. 1989), the court held that a former female high school student who had been sexually [**43] abused and forced to engage in various sexual acts during her entire high school years and thereafter by the band director of the school, some of which acts occurred in the band room and on trips for band functions, could maintain a 42 U.S.C. @ 1983 civil rights action against the school district and certain of its officials for damages. The court distinguished Stoneking from DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989) in one significant aspect, i.e., "[The] principal distinction between DeShaney's situation and that of Stoneking is that DeShaney's injuries resulted at the hands of a private actor, whereas Stoneking's resulted from [*1190] the actions of a state employee." Id. at 724.

The Court was careful to point out that the band director was a school district employee subject to its control during the performance of his official duties and that "[many] of Wright's interactions with Stoneking occurred in the course of his performance of his official responsibilities, such as during school -sponsored events and trips, and sometimes on school property." Id. Liability of the school district was claimed [**44] by reason of "[their] own actions in adopting and maintaining a practice, custom or policy of reckless indifference to instances of known or suspected sexual abuse of students by teachers, in concealing complaints of abuse, and in discouraging students' complaints about such conduct." Id. at 724-25. The evidence supported these contentions.

Between 1978 and 1982, the principal and assistant principal in Stoneking had received at least five complaints about sexual assaults of female students by teachers and staff members which were repressed and concealed. On that foundation, the court held that it is for a jury to determine whether there was a causal relationship between the school district's practices, customs or policies and the repeated sexual assaults in the case. The court affirmed the district court's denial of a motion for summary judgment filed by the school principal and assistant principal. Significantly, however, the court reversed the district court's denial of a motion for qualified immunity filed by Frederick Shuey, the superintendent of the school district:

> [We] must conclude, in light of our precedent, that Stoneking's claims against Shuey amount to mere [**45] "inaction and insensitivity" on his part. . . . We cannot discern from the record any affirmative acts by Shuey on which Stoneking can base a claim of toleration, condonation or encouragement of sexual harassment by teachers which occurred in one of the various schools within his district.

Id. at 731.

Comparing the facts of the case at bar with Stoneking leads to the inescapable conclusion that for purposes of liability there is no comparison. In Stoneking, the court had no difficulty determining that the sexual acts practiced by the band director during school hours and on school business were those of a state actor. Such cannot be said of Epps' status when he practiced the child molestation charged in our case. Furthermore, there is no evidence that Dr. Clayton or Principal Daniels ever concealed or attempted to cover-up any child abuse actions against school children. Nor is there any evidence that either were ever aware of any child molestation acts committed by Epps (beyond the report from Mrs. Kelley) or other sexual improprieties on Epps' part until the June 13-14, 1984, incidents, which occurred away from school property and in relation to an activity unrelated [**46] to school sponsorship. It is significant that the Stoneking court found, for causation purposes, that the school district policy had to relate specifically to toleration, condonation or encouragement of sexual harassment.

Our case is much more akin factually to those actions brought under 42 U.S.C. @ 1983 involving acts of an off-duty police officer during private employment as a security guard. However, even this comparison is tenuous because in our case Epps did not, on June 13-14, 1984, perform any duties or functions as a teacher or coach and he was completely free of any and all contractual obligations to the School District.

In Travers v. Meshriy, 627 F.2d 934 (9th Cir. 1980), the court affirmed a judgment awarding damages to a bank customer who brought a 42 U.S.C. @ 1983 action against the bank and its employees alleging false imprisonment, assault, slander, and intentional infliction of emotional distress resulting from his detention by an off-duty policeman employed by the bank. The court held that there was sufficient state involvement in Officer Gibson's actions to render them "under color of state law:"

> [Gibson] himself testified that he responded to Meshriy's [**47] [a bank supervisor] call as a police officer rather than as a bank employee. Furthermore, it was established [*1191] at trial that using off-duty police officers as "security tellers" at the bank was part of a police department "secondary hiring" program, and that the police department selected the officers for the program. An officer who had been instrumental in establishing the program testified that if an officer believed a crime had been committed, or was directed by a bank officer to stop an individual, his or her primary duty was to the department, not to the bank. Gibson flashed his police identification at Traver, moreover, and introduced himself as a police officer before instructi[illegible] Traver to sit down on the platform. All these indicia of state action compel [illegible] conclusion that Gibson was acting "under color of state law" when he responded to Meshriy's call for help.

[illegible] at 938.

We observe that none of the indicia set forth in Travers v. Meshriy leading to the conclusion that there was sufficient state involvement to render Officer Gibson's actions as taken under "color of state law" apply in the instant case. To the contrary, there is no evidence showing that the School [**48] District lent any sponsorship or encouragement to the actions taken by Epps on June 13-14, 1984, to enlist the plaintiffs in an effort to raise money for summer basketball camp. As such, Epps could not have been considered to be acting as a teacher or basketball coach because the incident occurred during his summer vacation from any school duties.

In Robinson v. Davis, 447 F.2d 753 (4th Cir.), cert. denied, 405 U.S. 979 (1972), some part-time town police officers and part-time campus security officers were held not to have acted under "color of state law" for 42 U.S.C. @ 1983 purposes when they requested that students attend a college administrative hearing because, although wearing their official police uniforms, the plaintiffs-students summoned by the security officers were cognizant that those individuals were fellow students acting as security officers. Insofar as the municipality was concerned, the court held that "[The] elements of control over, involvement in and direct responsibility for the actions of the private party [the security officers] present in Burton [Burton v. Wilmington Parking Authority, 365 U.S. 715 , 6 L. Ed. 2d 45 , 81 S. Ct. 856 (1961)] are lacking here." Id. at 757-58.

In [**49] Watkins v. Oaklawn Jockey Club, 183 F.2d 440 (8th Cir. 1950), the court held that an off-duty sheriff and his deputy did not act under color of state law for purposes of maintaining an action of false arrest and imprisonment under 42 U.S.C. @ 1983 when the deputy, upon orders of the president of the race track and the sheriff, ejected the plaintiff from the track. The court deemed it significant that the deputy did not arrest the plaintiff and that he simply stated to the plaintiff that he was to be ejected, thereupon escorting him to the gate. The court placed particular emphasis on the fact that the sheriff and the deputy were acting only in the ambit of their personal pursuits and that they were not performing any duty imposed upon them by the state.

In Crowder v. Jackson, 527 F. Supp. 1004 (W.D.Pa. 1981), the court held that plaintiff's 42 U.S.C. @ 1983 claim against a municipality must fail where plaintiff was allegedly beaten by an off-duty policeman working as a security guard at a grocery store. The complaint alleged that the municipality allowed its policeman to "moonlight" in uniform as security officers and that it failed to properly train them. The court cited [**50] to Rizzo v. Goode, 423 U.S. 362 , 46 L. Ed. 2d 561 , 96 S. Ct. 598 (1976) where the court observed that plaintiff had failed to show "an affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy -- express or otherwise -- showing their authorization or approval of such misconduct." 423 U.S. at 371. The court held:

Plaintiff's naked allegations regarding the Borough's failure to train its employees, and permitting its police officers to "moonlight" are insufficient since there is no foundation for the required showing that the Borough authorized, approved, or was indifferent to Mr. Jackson's [*1192] action. The plaintiff's theory of municipal liability under section 1983, therefore must fail.

527 F.Supp. at 1006.

We hold that the district court erred, as a matter of law, in submitting the issue of School District's liability to plaintiffs under 42 U.S.C. @ 1983 for the child molestation acts committed by Epps on June 13-14, 1984. We hold that there was no state action involved when the plaintiffs were molested by Epps; Epps was not acting under color of state law when he molested the plaintiffs; the policy or custom of School District relative to its procedure [**51] in the investigation, hiring and supervision of teachers was not the "moving force" behind the alleged deprivation of plaintiffs' constitutionally protected rights; and the district court erred in failing to grant School District's motion for a directed verdict at the close of all of the evidence, or in the alternative, in denying School District's motion for judgment notwithstanding the verdict. In so holding, we have viewed the evidence and all reasonable inferences therefrom in the light most favorable to the plaintiffs. See Richardson v. City of Albuquerque, 857 F.2d 727, 731 (10th Cir. 1988).

II.

School District argues that the district court erred in submitting to the jury the issue whether the School District's policy or custom -- i.e., its established procedure in investigating, hiring and supervision of teacher -- constituted deliberate indifference to or reckless disregard for the rights of the plaintiffs and, if so, whether such policy was the moving force behind a constitutional deprivation. We agree.

In Oklahoma City v. Tuttle, 471 U.S. 808, 824 n. 7 , 85 L. Ed. 2d 791 , 105 S. Ct. 2427 (1985), the Supreme Court observed that "[it] is an open question whether a policymaker's 'gross negligence' in establishing [**52] police training practices could establish a 'policy' that constitutes a 'moving force' behind subsequent unconstitutional conduct, or whether a more conscious decision on the part of the policymaker would be required." Even so, the Court repeated the necessity of finding a direct causal connection between the municipal conduct (policy) and the constitutional deprivation. Id. at 824-25, n. 8 (requiring an "affirmative link.") See also Polk County v. Dodson, 454 U.S. 312 , 70 L. Ed. 2d 509 , 102 S. Ct. 445 (1981) (policy must be the "moving force" behind the constitutional deprivation).

In City of Canton, Ohio v. Harris, supra, the Supreme Court held that municipal liability under @ 1983 attaches where city policy makers elect deliberately to follow a course of action from among various alternatives (there, a training program for its police officers) which is so inadequate that the policymakers acted deliberately indifferent to a specific need leading to the violation of constitutional rights. Furthermore, the Court spoke of the nexus between the condemned "policy" and the ultimate injury, i.e., that the policy must actually cause the alleged injury:

> Moreover, for liability to attach in this circumstance [**53] the identified deficiency in a city's training program must be closely related to the ultima injury, thus in the case at hand, respondent must still prove that the deficiency in training actually caused the police officers' indifference to he medical needs. . . .

* * * *

To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under @ 1983 . . . [and which would permit] . . . cases against cities for their 'failure to train' employees to go forward under @ 1983 on a lesser standard of fault [which] would result in de facto respondeat superior liability on municipalities -- a result we rejected in Monell, 436 U.S. at 693-94 . . . claims . . . alleging that the city's failure to provide training to municipal employees . . . can only yield liability against a municipality where the city's failure to train reflects deliberate indifference to the constitutional rights of its inhabitants.

109 S.Ct. at pp. 1206-07.

Under the standard of negligence mandated by City of Canton, Ohio v. Harris, [*1193] supra, i.e., that a consciously adopted "policy" (here the established procedure of the School District in the investigation, hiring and [**54] supervision of teachers) must, in a causal sense, reflect deliberate indifference to the constitutional rights of plaintiffs, we must hold that the evidence in this case is simply insufficient to demonstrate that the School District's policy reflected a reckless disregard or deliberate indifference to the alleged constitutional rights of the plaintiffs violated by Epps on June 13-14, 1984. It is by hindsight that the need to make inquiries of law enforcement agencies concerning an applicant's felony record rather than relying on the fact that a teacher convicted of a felony is not entitled to have a teaching certificate in the State of Oklahoma seems clear. Nothing done or undone by Dr. Clayton or Principal Daniels, however, could give rise to deliberate indifference to the constitutional rights of the plaintiffs. "If the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from respondeat superior." City of St. Louis v. Praprotnik, 485 U.S. at 126.

This court has applied the "deliberate indifference" standard in many civil rights cases, although sometimes positing it in terms of reckless disregard or gross [**55] negligence. In all cases, we have applied a much more stringent test than ordinary negligence. In Garcia v. Salt Lake County, 768 F.2d 303 (10th Cir. 1985), we applied the "deliberate indifference" test in a 42 U.S.C. @ 1983 action brought against Salt Lake County and certain of its officials, on a claim that its official policies, practices and customs were deliberately indifferent to serious medical needs of persons confined in the county jail before conviction and were violative of the Eighth Amendment. We there held that:

Deliberate indifference to serious medical needs may be shown by proving there are such gross deficiencies in staffing, facilities, equipment, or procedures that the inmate is effectively denied access to adequate medical care. See Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980), cert. denied, 450 U.S. 1041, 101 S. Ct. 1759, 68 L. Ed. 2d 239 (1981). . . .

Id. at 308.

See also: Ware v. Unified School District 492, Butler County, Kansas, (10th Cir. 1989) (In @ 1983 action in which it was alleged that a school district's secretary was terminated because she exercised constitutionally protected speech, held that a direct causal link must be [**56] demonstrated between *acts of the governing body and the alleged constitutional deprivation and th* the governing body exercised its decision-making authority with deliberate indifference to the protected constitutional rights); Starrett v. Wad840 F.2d 741 (10th Cir. 1988) (Federal inmate brought @ 1983 suit alleging that prison officials placed him in the general prison population, resulting in attacks by an unknown inmate and serious [**57] injuries; held that to rise to level of Eighth Amendment violation, failure of prison officials to protect inmates must be wanton, not inadvertent or error in good faith); Meade v. Grubbs, 841 F.2d 1512 (10th Cir. 1988) (Municipality may be held liable under @ 1983 for excessive use of force by police officers where there is essentially complete failure to train, or training so reckless or grossly negligent that future misconduct is almost inevitable).

In reviewing a denial of a motion for judgment notwithstanding the verdict, such denial is error "[only] when the evidence [*1194] points but one way and is susceptible to no reasonable inferences sustaining the position of the party against whom the motion is made." Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1547 (10th Cir. 1988). And our review of a denial of a motion for a new trial focuses on whether the "[verdict] is clearly, decidedly, or overwhelmingly against the weight of the evidence." Champion Home Builders v. Shumate, 388 F.2d 806, 808 (10th Cir. 1967).

We hold that, as a matter of law, the evidence in the case at hand was insufficient to establish that the School District's policy of investigating, hiring and [**58] supervising teachers was so wanting that it constituted deliberate indifference or reckless disregard for the constitutional rights the plaintiffs. The district court erred in denying the School District's motion for directed verdict at the close of all of the evidence, or, in the alternative, in denying School District's motion for judgment notwithstanding the verdict.

We REVERSE.

1ST CASE of Level 1 printed in FULL format.

STATE OF NEW JERSEY, Plaintiff-Respondent, v. J. Q.,
Defendant-Appellant.

A-325-88T4

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

1991 N.J. Super. LEXIS 377

May 1, 1991, Submitted
November 14, 1991, Decided

NOTICE: [*1] Approved for Publication December 5, 1991.

PRIOR HISTORY: On appeal from Superior Court, Law Division, Essex County.

DISPOSITION: Reversed and Remanded.

COUNSEL: Wilfredo Carabello, Public Defender, attorney for appellant (Amy Gershenfeld Donnella, Designated Counsel, of counsel and on the briefs).

Robert J. Del Tufo, Attorney General, attorney for respondent (Cherrie Madden Black, Deputy Attorney General, of counsel and on the brief).
JUDGES: Before Judges King, Long and Stern.

[illegible]NIONBY: LONG

OPINION: The opinion of the court was delivered by LONG, J.A.D.

I

We are called upon here to determine the extent to which expert evidence may be utilized in a child sex abuse case to shore up a victim-witness's testimony. Defendant, J. Q., who was convicted of a series of sex crimes against his young daughters, N. Q. and C. Q., claims that he was denied a fair trial because of the improper admission of expert testimony which bolstered the credibility of the children. n1 At issue is the admission of testimony as to the Child Sexual Abuse Accommodation Syndrome (CSAAS), other so-called syndrome evidence and expert opinion that the children's statements that they had been sexually abused were truthful.

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n1 He also contends that the trial judge denied him his Sixth Amendment right to confrontation by allowing N. Q. and C. Q. to testify on closed circuit television; that a stipulation as to the expert testimony was improperly related to the jury; that one of the experts, Dr. Bresnahan lacked qualifications to give expert testimony in any field; that the sentence imposed was improper; that the record of the case was not adequately preserved, and that he was denied effective assistance of counsel.

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[illegible]

We hold that CSAAS evidence is generally reliable to explain secrecy, belat[illegible] disclosure and recantation by a child sex abuse victim; that syndrome evidenc[illegible] including CSAAS, is not reliable to prove the occurrence of sexual abuse, and that absent a question of capacity, a social science expert lacks the qualifications to render an opinion as to the truthfulness of a statement by another witness. Because the expert in this case testified before the jury as to syndrome evidence to prove that sex abuse occurred; opined as to the truthfulness of the children (and their mother), and rendered the opinion that the children were abused based in great measure upon these two interdicted classes of evidence, we are satisfied that the admission of her testimony was error clearly capable of producing an unjust result. n2 We thus reverse and remand the case for a new trial. In this opinion, we will attempt to distinguish between admissible and inadmissible expert behavioral science evidence in a child sexual abuse case.

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n2 Because defendant did not object to the expert testimony at trial, this is the applicable standard. R. 2:10-2.

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[*3]

II

After a jury trial, defendant was convicted on count one of Essex County Indictment No. 3069-7-87 of first-degree aggravated sexual assault upon his daughter, C. Q., then seven years of age, n3 by vaginal penetration, contrary [illegible] the provisions of N.J.S.A. 2C:14-2a(1). On count two, defendant was convicted of fellatio upon C. Q. -- also first-degree aggravated assault contrary to N.J.S.A. 2C:14-2a(1), and on count three, of sexual conduct which would impair or debauch the morals of C. Q., while defendant had a legal duty of caring for her, in violation of N.J.S.A. 2C:24-4. On counts four, five, six and seven, defendant was convicted of having committed aggravated sexual assault upon his daughter, N. Q., then six years of age, n4 by vaginal penetration, anal penetration, fellatio and cunnilingus, all contrary to the provisions of N.J.S.A. 2C:14-2a(1). On count eight, defendant was convicted of engaging in sexual conduct which would impair or debauch the morals of N. Q., while he had a legal duty of caring for her, in violation of N.J.S.A. 2C:24-4. Defendant received an aggregate custodial term of 30 years with ten years of parole ineligibility. An appropriate [*4] Violent Crimes Compensation Board Penalty was also imposed.

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n3 While the indictment stated that C. Q. was seven at the time of the crime, her trial testimony and the statements of the prosecutor at trial indicate that she was six during at least part of 1984. She was ten when she testified in May 1988, and her birthdate was not given.

n4 As with C. Q., the indictment apparently did not note N. Q.'s correct age at the time the offenses were committed: she testified, and the prosecutor indicated, that she was four to five years old during 1984.

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II

Defendant lived with C. W. for approximately nine years. Although they never arried, they had two daughters: C. Q. born in 1977, and N. Q., born in 1979. hroughout 1984, the time period covered in the indictment, defendant and C. W. ived with their two daughters in an apartment in Newark, New Jersey. The arties separated in late 1985 or early 1986. C. W. married "Carlos" in 1985, nd defendant has also married since the separation.

Like their separation, the parties' [*5] relationship was acrimonious and ven violent -- both parties testified that defendant frequently hit C. W.. In 977, defendant had an affair, and C. W. surprised defendant and his paramour in he family apartment. C. W. beat up the woman friend, hit defendant, and ccording to him, told him she would "make him pay."

Defendant and C. W. apparently separated one or more times before the final reakup -- in December 1984 -- according to C. W. because defendant was "fooling round." Defendant went to Puerto Rico to visit his family. When he returned, C. . was pregnant, and they argued about whether the child was his. Defendant's uspicions were confirmed when C. W. testified at trial that J., born in 1985, as not defendant's child.

The parties finally separated at the end of 1985 or the beginning of 1986, fter defendant found C. W. in their apartment with another man. Defendant and . W. battled until the end. For example, N. Q. and defendant both described an ncident where defendant returned to the apartment and hit C. W. in the stomach [illegible] a hammer. When he dropped the tool, C. W. retrieved it, and hit him on the [illegible] with it.

Despite the stormy relationship between defendant [*6] and C. W., efendant continued to see his daughters from the time of the separation until sometime in 1987" when allegations about sexual misconduct came to light. For a hile, defendant took the girls to his apartment in New York every weekend, lthough the frequency of these visits eventually dropped off and according to . W., defendant came only "when he felt like it." C. W. explained that she ever wanted to keep her daughters away from their father because she had never nown her father and did not want the same to happen to N. Q. and C. Q. Indeed, here was some testimony that C. W. insisted that defendant assume some esponsibility for N. Q. and C. Q. Defendant stated that once C. W. came to his partment to ask why he did not visit the girls. He said she insisted that he ake them for the weekends because she was young and needed to go out.

These visits came to an end when N. Q. and C. Q. disclosed that defendant had ommitted sexual acts with them. These allegations surfaced "sometime in 1987." . W. was in her bedroom watching television, and her three daughters were in heir bedroom playing, when she heard a loud slap. Her youngest daughter had lapped N. Q. and left a [*7] mark on her face. N. Q. was on her knees neeling over J., and while C. W. at first thought they were just playing horsey back riding," J. Q. was crying and said N. Q. tried to pull down her anties and touch her "butt." C. W. asked N. Q.: "who told you to pull someones sic] panties [?]." At first N. Q. did not want to say but then she stated that it starts with d," and finally she said it was d-a-d. C. W. asked her if she [illegible] her stepfather or her real father, and N. Q. replied her father. C. Q. hen added that her father did things to her too but they did not want to tell ecause he threatened to hurt C. W.. C. W. told the girls that it was important not to lie and they denied that they were lying. C. W. asked them to use a baby doll to show what had happened to them, and after this she was convinced that they had been sexually abused. C. W. eventually took the children to her doctor, and then to the Division of Youth & Family Services. C. W. also testified that before these disclosures she had noticed that N. Q. had a vaginal discharge, but had attributed it to the child not changing her panties.

N. Q. and C. Q. both testified at trial, in the judge's chambers, via closed-circuit [*8] television broadcast into the courtroom. N. Q. was eight years old and in second grade when she testified in May 1988. She responded "yes" to the question as to whether she was four or five years old back in 1984, and also replied "yes" when questioned whether there "came a point in time where your daddy did things that you didn't like?" She then related that "he put his d-i-c-k in my vagina." By "d-i-c-k" she said she meant his "private parts." She said that this hurt a "little bit." He put his "d-i-c-k" in her mouth also, and "milk" came out of it. In response to whether he ever put anything on his d-i-c-k, she replied that when he was living with her mother he put some kind of chocolate syrup on it and made her lick it off. She also stated that he "french kissed" her, which she described as "when the guy puts the tongue into a woman's mouth." He also put his mouth on her vagina and licked her and put his d-i-c-k in her butt, which hurt her. He also put his finger in her vagina and moved it around. N. Q. stated that he did these things to C. Q. also, and that C. Q. saw him when he did them to her. The incidents occurred while defendant lived with them and their mother, but when [*9] her mother was out of the apartment. (At one point, N. Q. also stated that these incidents occurred when she and C. Q. visited defendant in Brooklyn.) She explained that she was not allowed to tell her mother about what was happening because she was afraid her father would hit her and C. Q. and her mother. N. Q. said that she would never lie and that while she was mad at her father, she had loved him very much before he started doing these things.

C. Q., age ten at the time of trial and in fourth grade, also stated that defendant did things to her and her sister N. Q. which they did not like. "He put his hot dog in our private place." He put it in "a lot" and it hurt "a little bit." He also put his penis in her "back part" and this hurt. He put chocolate syrup on his penis and put it in N. Q.'s mouth. Sometimes he would tell one of them to put her mouth on his penis, and he would put his mouth on the vagina of the other. She and N. Q. never told their mother about these acts because they were afraid they would get in trouble and that defendant would hit them.

C. Q. stated that after defendant left their apartment to live in Brooklyn, she and N. Q. would go to visit him. They wanted [*10] to see him because they loved him, but sometimes he made them go and would give them an "evil look" when he picked them up. She insisted, in the face of cross-examination, that her mother did not force her to tell this "story" about her father.

During cross-examination of N. Q. and C. Q., the defense tried to establish that they might have been exposed to sexual activity other than through defendant. For example, N. Q. acknowledged that she sometimes saw the boys in her apartment do "nasty" things to girls in the hallways, and she once saw a boy kissing C. Q. in the basement. C. Q. explained that once her mother sent her out of the room when a movie came on with "nasty things" in it. The movie showed [illegible] man putting his penis in a woman's vagina. She remarked that Carlos usually puts an "x" on some movies when he brought them home, but this time he did not.

Dr. Karen Bresnahan, a pediatric resident at the University of Medicine and Dentistry of New Jersey, testified that she had examined N. Q. Bresnahan stated that she had previously examined between 30 and 50 child abuse victims. Bresnahan reported that N. Q's. hymenal opening was stretched, but there were no lacerations and no evidence [*11] of blood or puss. She reported that it was not normal for a child to have a stretched hymen, and explained that the hymenal opening is usually about four millimeters. While she did not record how much N. Q's. hymen was stretched beyond this, she opined that her finding "makes one suspicious" that there had been some type of manipulation consistent with sexual abuse. The stretching she observed could result from penetration by penis or finger, although it is possible that a girl could be born either without a hymen or with one with a larger opening than average. The condition could not result from strenuous activity. On the other hand, Bresnahan opined that it is possible that a stretched hymen would be the only physical evidence of penetration by an adult male on a six or seven-year-old girl. Bresnahan concluded that N. Q. had been sexually abused, both because of the physical examination and because N. Q. had told her she had been abused. No medical testimony was presented with respect to C. Q. The parties stipulated that a Dr. Haratounian had examined C. Q. and found that she also had a stretched hymen.

Dr. Madeline Milchman, a Ph.D in clinical psychology, interviewed both C. Q. [*12] and N. Q. each for a period of approximately an hour and one-half. She was trained in child sex abuse, has taught psychology at Rutgers, and has published articles on how to determine whether child abuse has occurred. She chairs a subcommittee of the New Jersey Psychological Association which is devoted to conducting research into objective criteria for assessing whether or not a child is making a valid allegation of child sexual abuse. According to Milchman, such objective criteria is being tested in "pilot" cases.

Milchman stated that approximately one-third of her practice "consists of children who have [been] alleged to have been sexually abused." In the course of her training, Milchman became familiar with CSAAS, a pattern of behavior "found to occur again and again in children who are victims of incest." According to Milchman, it has five components:

> [A] pattern of behavior that is found to occur again and again in children who are victims of incest and there are five parts to that. The first part of the pattern is that the children tend to keep the incest a secret. Most people would expect that a child would tell if they had been sexually assaulted but in fact they tell very [*13] rarely. Usually the child will keep it a secret and will keep it a secret for a very long period of time.
>
> The second part of the pattern is helplessness and that has to do with why the child keeps it a secret. . . . The third part is entrapment and accommodation and what that means is that the child gets trapped, the child feels helpless, the child is told to keep it a secret. They have been threatened they are afraid that the parent would not love them any more. The parent has more power than the child. . . . And for that reason they will go along for years and years and years without ever making any disclosure to anybody. What the child does is to accommodate the abuse. That means they adjust to it.
>
> . . . .
>
> A disclosure is usually very delayed and it comes because of something external that has revealed the pattern. That's the fourth part, the delayed

disclosure. And the last part, the fifth part of the pattern is that sometimes the child can go back on it, they will say no I made it up and that's not true and they will give up. . . . And those are the five parts of the Sex Abuse Accommodation Syndrome.

Milchman concluded that N. Q. suffered from the first four symptoms of CSAAS [*14] - secrecy, helplessness, accommodation and delayed disclosure and was a withdrawn child. The only symptom she did not show, according to Milchman, was recantation. Milchman stated that C. Q. also exhibited the first four symptoms of CSAAS although her overt reactions were more outgoing and brash than those of N. Q..

Milchman stated that some child sex victims become withdrawn while others are more aggressive and that other outward signs of sexual abuse are "behavior syndromes of trauma, nightmares, falling grades in school, fights with other children, aggression, withdrawal, crying episodes for no apparent reason or for flimsy reasons, any kind of sign of stress, such as anxiety." She related that N. Q. experienced crying, nightmares and falling grades.

Milchman testified that the childrens' recitation of the events was consistent with sexual abuse because of its detail. She explained that descriptions of their "father's" acts of moving his finger in N. Q.'s vagina, and "french kissing," cannot be learned from watching an X-rated movie or from the "general culture" and that the chocolate syrup story was the type of "concrete, realistic detail" that supported the truthfulness of the [*15] allegation. n5

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n5 In 1989, Evid. R. 63(33) was enacted to allow detailed testimony of an out-of-court statement by a child victim of sexual abuse to be related to a jury if the child testifies and the statement is found to be trustworthy. At the time of this trial, N. Q. and C. Q.'s out-of-court statements to Dr. Milchman were inadmissible under existing exceptions to the hearsay rule. State v. D. R., 109 N.J. 348 (1988). Thus, she should not have been allowed to repeat the details of the children's allegations of sexual abuse before the jury. Because a reversal is in order on other grounds, we need not separately address this impropriety.

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As to the method she uses to assess the credibility of child witnesses, Milchman stated:

> One of the things that is very important to look at, in order to tell whether a child has been sexually abused or not when they are saying it is whether the child is lying. It's not real hard to tell whether a child is lying. Anybody who has raised a child has some [*16] knowledge about what cues them to whether a child is lying or not. You might look at whether the child appears sincere emotionally. You might look at whether what they are feeling is what they are saying, if they are telling you something frightening happening and they are giggling you are not going to believe them and if they are telling you something frightening happened and they are having a hard time telling you and maybe they are crying and shaking at the same time you are going to be more prone to believe them.

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recapped what she looks for in determining the truthfulness of an alleged ld sex victim:

Okay, I look for -- I look for many different things. I look for whether the child appears to be sincere. I look for whether or not the feeling that they have at the time goes with what they are saying or whether it contradicts what they are saying. I go for whether there are a lot of different behaviors that all point to the same conclusion. For example, is what the child saying, does that match the demonstrations that they give when they try to explain it with their hands or with dolls, does it match the pictures that they draw for me? Does it match what they told the mother; [*17] does it match what they told the DYFS worker; does it match what they told the prosecutor or investigator; or does it match what they told me? I look for consistency across a lot of different kinds of behaviors.

In a child who is telling the truth you don't get every detail the same because that's the nature of human memory that sometimes we forget one detail or another but you get a broad consistency. A lot of different behaviors all back each other up, they all say the same thing. A child who is lying or being programmed will be the opposite. You will tend to get a consistent verbal statement but if you then say well draw a picture for me they don't know what they are talking about, they can't draw a picture that will back it up or you say show it to me on the doll, they don't know what to do or they do something that looks like something you would see on television, very romantic, very general not specific, concrete details. That's another thing I look for are there realistic, concrete, specific kinds of details that are not the kinds of gs that you would tend to see on a television so that any kid could pick up any cable t.v. or movie that any kid could just pick up, that [*18] what I look for.

Milchman was then asked this question:

Q. Doctor, based on your examinations of the girls, can you give this jury your expert opinion as to whether or not both C. Q. and N. Q. were sexually abused?

She answered:

A. I believe that they were sexually abused.

On cross-examination, Milchman acknowledged that C. Q. had reported to her that she had once observed defendant and her mother engage in sexual intercourse and that C. Q. told her that the boys in her apartment building stand around in the hallways and try to "get" girls with "big breasts."

Milchman acknowledged that other "stressors" in a child's life could account for helplessness and secrecy she observed in C. Q. and N. Q.. Among them were poverty, the jailing of a family member and difficult living conditions. On redirect, Milchman offered her view that C. W. was not forcing the children to make these reports. She thought that, if anything, C. W. under-reacted; she noticed that the children had a vaginal discharge, but never had them examined. N. Q. experienced crying, nightmares, and falling grades, but her mother did not pond to these cues that N. Q. might be experiencing some problems. Further,] when Milchman met with C. W., C. W. asked her if children ever made up stories of sex abuse. Milchman did not think this was a woman who was "jumping on" the allegations.

The prosecutor's final question to Milchman was this:

> Defense counsel has gone through a litany of other possible reasons why the hildren behaved the way they did in terms of being withdrawn or how they could ave come up with this other sexual knowledge, despite the possible stresses of iving in a poor neighborhood and a poor environment with a lot of people round, despite the fact that they may have seen [C. Q.], may have seen her other and [J. Q.] copulating once, or may have seen things on TV, is it still our expert opinion that these children were sexually abused?

he answered "yes."

Defendant testified on his own behalf and denied having any sexual contact ith his daughters. He insisted that he loved them very much, and that anyone ho would have sex with a child is very sick. Defendant's brother, his present ife and some of his neighbors testified briefly. The brother stated that he saw . W. once at defendant's apartment after they had separated, and that she was sking defendant for money. A neighbor [*20] testified that she became cquainted with C. Q. and N. Q. when they began spending weekends at defendant's partment, and they seemed happy and glad to be with their father. In his losing statements, defense counsel suggested that the charges here were an utgrowth of C. W.'s vindictive plan to take revenge on a man who had betrayed nd beat her. Based on the foregoing evidence, defendant was convicted of each ount charged in the indictment. This appeal followed.

IV

Evid. R. 56(2) provides that:

> (2) A witness, qualified pursuant to Rule 19 as an expert by knowledge, skill, xperience, training or education may testify in the form of opinion or therwise as to matters requiring scientific, technical or other specialized nowledge if such testimony will assist the trier of fact to understand the vidence or determine a fact in issue.

fter being qualified as an expert, the witness is limited to testimony which is quarely within the area of expertise. State v. Zola, 112 N.J. 284, 423 (1988). he proponent of expert testimony must demonstrate that it would "enhance the nowledge and understanding of lay jurors with respect to other testimony of a [*21] special nature normally outside of the usual lay sphere." State v. elly, 97 N.J. 178, 209 (1984) (quoting State v. Griffin, 120 N.J. Super. 13, 20 (App. Div. 1972)). In addition, the proponent must demonstrate that the expert's estimony would be reliable. Id. In a new field this can be established in one f three ways: (1) by expert testimony that the scientific premises of the roposed testimony are generally accepted in the appropriate profession; (2) by uthoritative scientific and legal writings indicating that the scientific ommunity accepts the premises underlying the proffered testimony; or (3) by udicial opinions that indicate that the expert's premises have gained general cceptance. Id. at 210. n6 See also Ryan v. KDI Sylvan Pools, 121 N.J. 276 (1990).

--------------------Footnotes--------------------

n6 In Rubanick v. Witco Chemical Co., et al., N.J. (decided August 1 991), the Supreme Court recently adopted a more flexible standard to ablish the reliability of the theory advanced by a causation expert in a ic tort case. This standard has no applicability here.

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[*22]

Defendant contends that Milchman's testimony incorporated an entirely new field of psychological endeavor (CSAAS) and that no effort was made by the prosecutor to demonstrate its reliability pursuant to Kelly. According to defendant, the erroneous admission of this evidence meets the plain error standard of R. 2:10-2. The State counters that any error in the procedure pursuant to which Milchman's testimony was admitted was harmless. While conceding that no record was created to undergird a finding that either of the first two scientific reliability tests of Kelly were met, the State contends that "the courts of foreign jurisdictions are nearly unanimous in their acceptance of expert testimony on CSAAS in order to explain delayed disclosure or recantation on the part of a complaining witness" thus satisfying the third Kelly test. Neither of these positions is entirely correct.

The obligation of the proponent of expert evidence to meet the requirements of Evid. R. 56(2) and Kelly, exists whether or not an objection to the proffer is advanced and it is the duty of the trial judge to make a preliminary determination that the testimony would indeed enhance the understanding [*23] of the lay jurors; that the witness is qualified by knowledge, skill, experience, training or education to render the proffered scientific opinion, and that the expert's scientific premises are reliable. As defendant correctly nts out, that did not occur in this case. However, contrary to defendant's w, this procedural defect does not, in itself, compel reversal. The issue is whether the evidence, although not established at trial to be so, was, in fact, reliable. According to the State, it can be demonstrated that CSAAS is reliable under the third prong of Kelly thus obviating the possibility that the procedural error in its admission was anything more than harmless. We agree that a portion of Milchman's CSAAS testimony meets the third prong of Kelly but not all of it. Neither party seems to have recognized that Milchman's testimony was not a single seamless garment. Rather, it was made up of a number of entirely disparate elements, each subject to distinct analysis resulting in varying conclusions.

V

Because child sexual abuse cases are often difficult to prove, investigators, lawyers and judges have "with increasing frequency [been] turning to the behavioral and [*24] clinical sciences for guidance on issues relevant to the reliability of children's eyewitness testimony." Doris, The Suggestibility of Children's Recollections at xi (J. Doris ed. 1991). Overall, six categories of social science expert testimony have developed and have regularly been proffered by the state to support child witnesses in sexual abuse cases. Bulkley, Social Science Expert Testimony for the Prosecution Regarding Behaviors of Sexually Abused Children: National Trends and Recommendations, American Bar Association Center on Children and the Law, Washington, D.C. (in preparation) [hereinafter Bulkley, Social Science Expert Testimony].

The first category is "rehabilitative" testimony offered to explain puzzling conduct of the child victim (such as delayed reporting, minimization and recantation) to meet a defense attack on the child's credibility. (One psychiatrist has termed these behaviors as CSAAS. Summit, The Child Sexual Abuse Accommodation Syndrome, 7 Child Abuse & Neglect 177 (1983) [hereinafter Summit].) The second category is syndrome evidence, including CSAAS evidence, or supposed typical child victim behaviors (for example, depression, anxiety, bedwetting) [*25] proffered, not to explain unusual conduct of the child, but to prove affirmatively that sexual abuse has occurred. The third category is a spin-off of the second with the expert testifying to typical behaviors of a child victim specifically related to the child victim in the case. The fourth is expert testimony that the child has been abused and the fifth is testimony that the child is credible. (The sixth category, which has no relevance here, involves profile testimony on the sex offender.) Bulkley, Social Science Expert Testimony, supra, at 3-4. The first five of these categories are involved in this case to one extent or another.

Milchman testified that CSAAS explained the childrens' secrecy and delayed reporting; that each child exhibited four out of the five behaviors "found to occur again and again in children who are victims of incest;" that N. Q. exhibited other outward signs of sexual abuse including crying, nightmares and failing grades; that it was her belief that the children had, in fact, been abused; and, that she believed the children (and C. W.) to be credible. We will address these matters serially.

VI

CSAAS is a theory of relatively recent vintage. It [*26] was first enunciated in 1983. See Summit, supra. In the article, Summit described five characteristics commonly observed in sexually abused children: secrecy, helplessness, accommodation, delayed and unconvincing disclosure and recantation. CSAAS was not intended as a diagnostic device or a test for sexual abuse. n7 It is an example of a class of rehabilitative testimony generally viewed as admissible, not to prove that the child has been abused, but to explain certain behaviors of the child victim and to "rebut an implied or express assertion by the defense that such behaviors indicate the child is lying." Bulkley, Social Science Expert Testimony, supra at 4. Its basic purpose is to dispel the idea that secrecy, belated disclosure and/or recantation have the same negative implications in a child abuse case as they would where an offense against an adult is concerned:

> If a complaining witness in a burglary trial, after making the initial report, denied several times before testifying at trial that the crime had happened, the jury would have good reason to doubt seriously her credibility at any time. However, in this instance we are concerned with a child who states she [*27] has been the victim of sexual abuse by a member of her family. The experts testified that in this situation the young victim often feels guilty about testifying against someone she loves and wonders if she is doing the right thing in so testifying. It would be useful to the jury to know that not just this victim but many child victims are ambivalent about the forcefulness with which they want to pursue the complaint, and it is not uncommon for them to deny the act ever happened. Explaining this superficially bizarre behavior by identifying its emotional antecedents could help the jury better assess the witness's credibility.

State v. Middleton, 294 Or. 427, 657 P.2d. 1215, 1219-20 (1983) (Campbell, J.) In addition:

[illegible]e jurors may be capable of personalizing the emotions of victims of physical [illegible]ult generally, and of assessing witness credibility accordingly, tensions unique to the trauma experienced by a child sexually abused by a family member have remained largely unknown to the public. As the expert's testimony demonstrates the routine indicia of witness reliability--consistency, willingness to aid the prosection, straight-forward rendition [*28] of the facts--may, for good reason, be lacking. As a result jurors may impose standards of normalcy on child victim/witnesses who consistently respond in distinctly abnormal fashion.

Middleton, 294 Or. at 440, 657 P.2d at 1222 (Roberts, J., concurring) (1983).

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n7 The syndrome does not detect sexual abuse. Rather, it "assumes a molestation has occurred and seeks to describe and explain common reactions of children to the experience." People v. Bowker, 203 Cal. App. 3d 385, 394, 249 Cal Rptr. 886, 892 (Ct. App. 1988) (emphasis in original). See People v. Beckley, 434 Mich. 691, 706-07, 456 N.W.2d 391, 397-98 (1990); Myers, Bays, Becker, Berliner, Corwin & Saywitz, Expert Testimony in Child Sexual Abuse Litigation, 68 Neb. L. Rev. 1, 67 (1989) [hereinafter Myers, Expert Testimony].

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The Supreme Court of Arizona in State v. Moran, 151 Ariz. 378, 728 P.2d 248, 251-52 (1986) [*29] adopted the concurring view expressed by Justice Roberts [illegible] Middleton:

We agree with Justice Roberts's analysis. "Jurors, most of whom are unfamiliar with the behavioral sciences, may benefit from expert testimony" explaining behavior they might otherwise "attribute to inaccuracy or prevarication." Lindsey, 149 Ariz. at 474, 720 P.2d at 75; accord State v. Myers, 359 N.W.2d 604, 610 (Minn. 1984) (allowing expert testimony explaining "puzzling aspects of the child's conduct and demeanor which the jury could not otherwise bring to its evaluation of [the victim's] credibility"). Such evidence may harm defendant's interests, but we cannot say it is unfairly prejudicial; it merely informs jurors that commonly held assumptions are not necessarily accurate and allows them to fairly judge credibility. See State v. Chaple, supra.

Put another way, CSAAS is evidence designed to disabuse a jury of false assumptions. As noted by the Supreme Court of Delaware in Wheat v. State, 527 A.2d 269, 273 (Del. 1987), "where a complainant's behavior or testimony is, to the average lay person, superficially inconsistent with the occurrence [*30] of a rape . . . expert testimony can assist a jury in this regard."

Indeed, this testimony is similar to battered woman syndrome evidence which, according to Kelly, helps a jury to understand why a woman, subjected to beatings by her husband, does not simply leave him. State v. Kelly, supra, 97 N.J. at 205. In neither case is the evidence offered as probative of the question of whether abuse has occurred. Rather, the evidence is only offered to [illegible]ain reactions to abuse. This is to prevent jurors from viewing these [illegible]tions as inconsistent with the happening of abuse and to avert the commonsense conclusion in a battered wife case that if the wife really had been battered she would have moved out, and in a child sex abuse case, that if the child really had been abused, he or she would have told someone immediately or would not have recanted.

This shielding use of CSAAS testimony has been approved by our Supreme Court in State v. R.W., 104 N.J. 14, 26 (1986):

Understandably, when such testing has a reasonable probative bearing upon an infant witness's competency or credibility, it may be sought, and its results proffered, on an adequate [*31] showing, by the proponent of the child's testimony, as well as by the defendant. In State v. Myers, 359 N.W.2d 604 (Minn. 1984), the Minnesota Supreme Court reviewed an incest prosecution in which a doctor had testified concerning the characteristics of abused children, including testimony that sexually abused children often will not report the abusive incidents. The court affirmed the use of the testimony, stating:

With respect to most crimes the credibility of a witness is peculiarly within the competence of the jury, whose common experience affords sufficient basis for the assessment of credibility. In most cases, even though an expert's testimony may arguably provide the jury with potentially useful information, the possibility that the jury may be unduly influenced by an expert's opinion mitigates against admission. Nor should the credibility of witnesses in criminal trials turn on the outcome of a battle among experts. The nature, however, of the sexual abuse of children places lay jurors at a disadvantage. Incest is prohibited in all or almost all cultures, and the common experience of the jury may represent a less than adequate foundation for assessing [*32] the credibility of a young child who complains of sexual abuse. If the victim of a burglary failed to report the crime promptly, a jury would have good reason to doubt that person's credibility. A young child subjected to sexual abuse, however, may for some time be either unaware or uncertain of the criminality of the abuser's conduct. . . . By explaining the emotional antecedents of the victim's conduct and the peculiar impact of the crime on other members of the family, an expert can assist the jury in evaluating the credibility of the complainant. [Id. at 609, 610.]

It has also received nearly universal judicial approval in other jurisdictions. See, e.g., Ex parte Hill, 553 So.2d 1138 (Ala. 1989); Nelson v. State, 782 P.2d 290 (Alaska Ct. App. 1989); Bostic v. State, 772 P.2d 1089 (Alaska Ct. App. 1989), rev'd on other grounds 805 P.2d 344 (Alaska 1991); State v. Moran, supra, 728 P.2d. at 252; State v. Lindsey, 149 Ariz. 472, 720 P.2d 73, 75 (1986); People v. Harlan, 222 Cal. App. 3d 439, 271 Cal. Rptr. 653 (Ct. App. 1990); [*33] People v. Stark, 213 Cal. App. 3d 107, 261 Cal. Rptr. 479 (Ct. App. 1989); People v. Bowker, supra, 249 Cal. Rptr. at 891; People v. Gray, 187 Cal. App. 3d 213, 231 Cal. Rptr. 658, 660 (Ct. App. 1986); People v. Dunnahoo, 152 Cal. App. 3d 561, 199 Cal. Rptr. 796, 804 (Ct. App. 1984); People v. Hampton, 746 P.2d 947 (Colo. 1987); State v. Spigarolo, 210 Conn. 359, 556 A.2d 112, cert. denied, 493 U.S. 933, 107 L.Ed.2d 312 (1989); Wheat v. State, supra; Hicks v. State, 196 Ga. App. 311, 396 S.E.2d 60 (Ct. App. 1990); State v. Batangan, 71 Haw. 552, 799 P.2d 48 (1990); People v. Wasson, 211 Ill. App. 3d 264, 569 N.E.2d 1321 (App. Ct. 1991); People v. Nelson, 203 Ill. App. 3d 1038, 561 N.E.2d 439 (App. Ct. 1990), appeal denied, 136 Ill. 2d 551, 567 N.E.2d 339 (1991); [*34] State v. Black, 537 A.2d 1154, 1156 (Me. 1988); State v. Preston, 581 A.2d 404, 407 (Me. 1990); People v. Beckley, supra; People v. Matlock, 153 Mich. App. 171, 395 N.W.2d 274, 277 (Ct. App. 1986); State v. Sandberg, 406 N.W.2d 506, 511 (Minn. 1987); State v. Hall, 406 N.W.2d 503 (Minn. 1987); State v. Myers, 359 N.W.2d 604, 610 (Minn. 1984); State v. Davis, 422

2d 296 (Minn. Ct. App. 1988); Hosford v. State, 560 So.2d 163 (Miss. 1990); n v. State, 100 Nev. 570, 688 P.2d 326, 326-27 (1984); People v. Gallow, .D.2d , 569 N.Y.S.2d 530 (App. Div.), appeal denied, 77 N.Y.2d 995, 575 .E.2d 406, 571 N.Y.S.2d 920 (1991); People v. Benjamin R., 103 A.D.2d 663, 481 .Y.S.2d 827, 831-32 (App. Div. 1984); State v. Bailey, 89 N.C. App. 212, 365 .E.2d 651, 655 (Ct. App. 1988); State v. Timperio, 38 Ohio App. 3d 156, 528 .E.2d 594 (Ct. App. 1987); [*35] State v. Garfield, 34 Ohio App.3d 300, 302, 18 N.E.2d 568 (Ct. App. 1986); State v. Middleton, supra; State v. Pettit, 66 r. App. 575, 675 P.2d 183, 185 (Ct. App.), review denied, 297 Or. 227, 683 P.2d 1 (1984); State v. Rogers, 293 S.C. 505, 362 S.E.2d 7, 8 (1987); State v. okey, 154 Vt. 129, 574 A.2d 766 (1990); State v. Hicks, 148 Vt. 459, 535 A.2d 76, 777 (1987); State v. Petrich, 101 Wash. 2d 566, 683 P.2d 173, 179-80 1984); State v. Cleveland, 58 Wash. App. 634, 794 P.2d 546, 551-52 (Ct. App.), ert. denied, 115 Wash. 2d 1029, 803 P.2d 324 (1990), cert. denied, U.S. , 113 L.Ed.2d 468 (1991); State v. Madison, 53 Wash. App. 754, 770 P.2d 662 Ct. App.), review denied, 113 Wash. 2d 1002, 777 P.2d 1050 (1989); State v. ensen, 147 Wis.2d 240, 432 N.W.2d 913 (1988); [*36] Gale v. State, 792 P.2d. 70 (Wyo. 1990); Scadden v. State, 732 P.2d 1036, 1046 (Wyo. 1987). But see itchell v. Commonwealth, 777 S.W.2d 930 (Ky. 1989); Hester v. Commonwealth, 734 .W.2d 457 (Ky.), cert. denied, 484 U.S. 989, 98 L.Ed.2d 508 (1987); ommonwealth v. Garcia, 403 Pa. Super. 280, 588 A.2d 951 (Super. Ct. 1991); ommonwealth v. Dunkle, 385 Pa. Super. 317, 561 A.2d 5 (Super. Ct. 1989), appeal ranted, 524 Pa. 625, 574 A.2d 67 (1990). Compare Duckett v. State, 797 S.W.2d 06 (Tex. Crim. App. 1990) with Dunnington v. State, 740 S.W.2d 896 (Tx. Ct. pp. 1987).

oreover, a myriad of expert writings in the psychology field have tenanced this limited use of CSAAS evidence. See McCord, Expert sychological Testimony about Child Complainants in Sexual Abuse Prosecutions: A oray into the Admissibility of Novel Psychological Evidence, 77 Crim. L. & riminology 1, 58-64 (1986) [hereinafter McCord]; Myers, [*37] Expert estimony, supra; J. Myers, Child Witness Law and Practice (1987 & Supp. 1991); ulkley, Legal Proceedings, Reforms, and Emerging Issues in Child Sexual Abuse ases, 6 Behav. Sci. & The Law 153, 173-75 (1988); Bulkley, Social Science xpert Testimony, supra at 9-13 (suggesting, however, that more research egarding public knowledge of sexual abuse is necessary); Melton & Limber, sychologists' Involvement in Cases of Child Maltreatment, 44 Amer. Psych. 1225 Sept. 1989) (more research needed on public awareness of sexual abuse) hereinafter Melton & Limber]; Lorenzen, The Admissibility of Expert sychological Testimony in Cases Involving the Sexual Misuse of a Child, U. iami L. Rev. 1033, 1055-56 (1988); Note, Expert Testimony in Child Sexual Abuse rosecutions: A Spectrum of Uses, 68 B.U.L. Rev. 155, 167-70 (1988); Carter, dmissibility of Expert Testimony in Child Sexual Abuse Cases in California: etire Kelly-Frye and Return to a Traditional Analysis, 22 Loy. L.A.L. Rev. 103, 1133 (1989). But see Cohen, The Unreliability of Expert Testimony on the ypical Characteristics of Sexual Abuse Victims, 74 Geo. L.J. 429, 447 (1985). *38] Thus, to the extent that Milchman presented the CSAAS testimony for the urpose of explaining N. Q. and C. Q.'s secrecy and delayed reporting of the buse, we think it met the third reliability test established in State v. Kelly, upra; that it could have met the second reliability test of Kelly, and that its dmission, although procedurally flawed, is no basis for reversal.

t Milchman did not limit her CSAAS testimony to the rehabilitative task of xplaining the girls' secrecy and delayed reporting. Instead, she stated without ualification that N. Q. and C. Q. each exhibited four of the five symptoms of

CSAAS which she described as a pattern of behavior found to "occur again and again in children who are victims of incest." She also testified that N. Q. exhibited other "behavior syndromes of trauma," including "crying, nightmares and falling grades." This testimony left the jury with the impression that syndrome evidence is somehow diagnostic of sexual abuse and that because the girls evidenced four of the five symptoms exhibited by "victims of incest" and other "behavior syndromes of trauma" this was affirmative evidence that sexual abuse occurred. Not so. The consensus [*39] among scholars is that there are as yet no scientifically reliable indicators of child sexual abuse. n8 See Conte, Child Sexual Abuse: Looking Backward and Forward, in Family Sexual Abuse: Frontline Research and Evaluation 3 (M. Q. Patton ed. 1991); Berliner, Deciding Whether a Child Has Been Sexually Abused, in Sexual Abuse Allegations in Custody and Visitation Cases 48, 55 (E.B. Nicholson & J. Bulkley eds. 1988)[hereinafter Berliner]; Melton & Limber, supra at 1229; McCord, supra at 38; Melton, Childrens' Testimony in Cases of Alleged Sexual Abuse, 8 Advances in Developmental & Behavioral Pediatrics, 179, 189 (1987); Corwin, Berliner, Goodman, Goodwin & White, Child Sexual Abuse and Custody Disputes: No Easy Answers, 2 J. Interpersonal Violence 91 (1987); Golding, Mental Health Professionals and the Courts: The Ethics of Expertise, 13 Int'l J. Law & Psychiatry 281 (1990); Lloyd, Expert Testimony in Child Sexual Abuse Cases: What Does the Expert Know?, presented at American Bar Association Fifth National Conference on Children and the Law, November 1, 2, 3, 1990; Bulkley, Social Science Expert Testimony, supra. n9

It is impossible to make a general [*40] statement about the effects of sexual abuse on children. Children react differently to different situations depending on the number of variables that may be operating at the time of the occurrence. . . . Children who are sexually abused are not special children with special characteristics; they are not the victims of one particular offense, nor do they sustain identical injuries.

Rosenfeld, The Clinical Management of Incest and Sexual Abuse of Children, 22 Trauma 2, 3 (Oct. 1980).

No two children or families will react in exactly the same way to the presence of child sexual abuse. Also, because they are under a great deal of stress, their reactions and behavioral signs - whether conscious or unconscious - are subject to misinterpretation. Generalizations about the effects of any kind of interpersonal crisis often do a disservice to all individuals involved."

MacFarlane, Sexual Abuse of Children, in The Victimization of Women 93, 97 (J. Chapman & M. Gates eds. 1978). In short, as of this writing, the consensus of contemporary social science wisdom is that "there is . . . no demographic or psychological profile of children who have been sexually assaulted. . . . Clinical [*41] and empirical studies have established that there are effects of sexual abuse on children but have failed to demonstrate that there is a universal or uniform response." Berliner, supra, at 54-55.

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n8 Among the supposed symptoms of child sexual abuse are the following:

1. Secrecy; 2. A feeling of helplessness; 3. A sense of being trapped by th situation; 4. Accommodation to the abuse; 5. Nightmares (especially nightmares with an assaultive content); 6. Sleep disturbance; 7. Loss of appetite; 8.

[illegible]ressive behavior; 9. Pseudo-mature behavior; 10. Withdrawal; 11. Acting out; [illegible] Difficulty recalling details such as dates and times; 13. Fear of men; 14. Fear of further abuse; 15. Depression and anxiety; 16. Embarrassment at peer's knowledge of the abuse; 17. A negative view of sex; 18. A poor relationship between mother and daughter; 19. Running away from home; 20. Doubt that the nonabusing parent is strong enough to protect the child; 21. Confusion; 22. Conflicting versions of events; 23. Inarticulate descriptions; 24. Drawings by the child which contain enlarged sexual organs, or in the case of male genitalia, an erection and/or ejaculation; 25. Knowledge of sexual matters which would not be possessed by a child of the particular age unless the child had been exposed to information about sex or to sex acts; 26. Use of sexual words of which a child of the particular age would have no knowledge unless the child had been exposed to the words; 27. Use of anatomically correct dolls in ways that are inexplicable in a child of the particular age unless the child has experienced sexual contact; 28. Delay in reporting abuse; 29. Recantation. [J. Myers, Child Witness Law and Practice, supra, at 152-53].
These commentators characterized this compilation as an "ambiguous laundry list of symptoms." Id. at 159. [*42]

n9 Indeed, Milchman herself testified at this trial that she is conducting "research" in this area and that a "pilot" project to test the affirmative use of syndrome evidence is underway.

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This view has been adopted by a growing number of the jurisdictions which [illegible]e faced the issue of whether syndrome evidence, including CSAAS, may be used [illegible] affirmative proof that abuse occurred. The following jurisdictions grappled with the question of the scientific reliability of such a use and have rejected the notion outright as without scientific basis. See, e.g., Nelson v. State, supra; State v. Moran, supra; Johnson v. State, 292 Ark. 632, 732 S.W.2d 817 (1987); Russell v. State, 289 Ark. 533, 712 S.W.2d 916 (1986); People v. Leon, 214 Cal. App.3d 925, 263 Cal. Rptr. 77 (Ct. App. 1989); People v. Jeff, 204 Cal. App.3d 309, 251 Cal. Rptr. 135 (Ct. App. 1988); People v. Bowker, supra; [*43] Mitchell v. Commonwealth, supra; Lantrip v. Commonwealth, 713 S.W.2d 816 (Ky. 1986); State v. Lawrence, 541 A.2d 1291 (Me. 1988); State v. Black, supra; People v. Beckley, supra; People v. Duell, 163 A.D.2d 866, 558 N.Y.S.2d 395 (App. Div. 1990); State v. Milbradt, 305 Or. 621, 756 P.2d 620 (1988); Commonwealth v. Garcia, supra; State v. Hudnall, 293 S.C. 97, 359 S.E.2d 59 (1987); State v. Schimpf, 782 S.W.2d 186 (Tenn. Crim. App. 1989); State v. Gokey, supra; State v. Jensen, supra.

It is true that some courts have accepted the affirmative use of syndrome evidence in a child sex abuse case. [See e.g., U.S. v. Azure, 801 F.2d 336 (8th Cir. 1986); People v. Pronovost, 756 P.2d 387 (Colo. Ct. App. 1987), aff'd, 773 P.2d 555 (1989); Ward v. State, 519 So.2d 1082 (Fla. Dist. Ct. App. 1988); [*44] Keri v. State, 179 Ga. App. 664, 347 S.E.2d 236 (Ct. App. 1986); People v. Server, 148 Ill. App. 3d 888, 499 N.E.2d 1019 (Ill. App. Ct. 1986), appeal denied, 114 Ill.2d 555, 508 N.E.2d 734, cert. denied, 484 U.S. 842, 98 L.Ed.2d 88 (1987); State v. Reser, 244 Kan. 306, 767 P.2d 1277 (1989); State v. Garden, 404 N.W.2d 912 (Minn. Ct. App. 1987); State v. Walters, Mont. , 806 P.2d [illegible] (1991); Townsend v. State, 103 Nev. 113, 734 P.2d 705 (1987); In re Nicole [illegible] 71 N.Y.2d 112, 518 N.E.2d 914, 524 N.Y.S.2d 19 (1987); State v. Bachman, 446 N.W.2d 271 (S.D. 1989); State v. Timperio, supra; State v. Edward Charles L., 398 S.E.2d 123 (W. Va. 1990); Griego v. State, 761 P.2d 973 (Wyo. 1988).]

However, most of these decisions failed to distinguish between the rehabilitative and affirmative [*45] use of syndrome evidence; a number misread the cases which approved the rehabilitative use of such evidence as support for the more expansive use, and several incorrectly analogized child sexual abuse accommodation syndrome evidence to battered child and battered wife syndrome evidence.

A Myers article explains how this misuse of syndrome evidence came about:

Summit did not intend the accommodation syndrome as a diagnostic device. The syndrome does not detect sexual abuse. Rather, it assumes the presence of abuse, and explains the child's reactions to it. Thus, child sexual abuse accommodation syndrome is not the sexual abuse analogue of battered child syndrome, which is diagnostic of physical abuse. With battered child syndrome, one reasons from type of injury to cause of injury. Thus, battered child syndrome is probative of physical abuse. With child sexual abuse accommodation syndrome, by contrast, one reasons from presence of sexual abuse to reactions to sexual abuse. Thus, the accommodation syndrome is not probative of abuse.

Unfortunately, a number of mental health professionals, lawyers, and commentators drew unwarranted comparisons between battered child syndrome and child [*46] sexual abuse accommodation syndrome. This error led to considerable confusion. First, some professionals misinterpreted Summit's article, believing Summit had discovered a "syndrome" that could diagnose sexual abuse. This mistake is understandable, if not forgivable. Mental health and legal professionals working in the child abuse area had long been accustomed to thinking in terms of syndrome evidence to prove physical abuse. Battered child syndrome was an accepted diagnosis by the time Summit's accommodation syndrome came along in 1983. It was natural for professionals to transfer their understanding of battered child syndrome to this new syndrome, and to conclude that the accommodation syndrome, like battered child syndrome, could be used to detect abuse.

If the first error was erroneously equating child sexual abuse accommodation syndrome with a diagnostic device, the second mistake was hardly less serious. Some professionals conflated the reactions described by Summit, which are not probative of abuse, with behaviors that are probative of abuse. This combination of behaviors was then denominated a syndrome, the presence of which was supposedly probative of abuse. The defect of [*47] this "syndrome" is that some of its components are probative of abuse and others are not. Opinions based on such a "syndrome" are of dubious reliability.

Widespread misunderstanding of child sexual abuse accommodation syndrome had unfortunate consequences. Expert testimony based in whole or in part on the syndrome led some courts to believe the accommodation syndrome was designed to diagnose child sexual abuse. So viewed, the syndrome is doomed to fail because it simply does not diagnose. Little wonder courts became suspicious of professional ability to detect sexual abuse. Unlike battered child syndrome, which is highly probative of nonaccidental injury, the accommodation syndrome appeared anything but reliable. Courts were not informed that the accommodation syndrome was being asked to perform a task it could not accomplish.

The accommodation syndrome has a place in the courtroom. The syndrome helps explain why many sexually abused children delay reporting their abuse, and why many children recant allegations of abuse and deny that anything occurred. If of the syndrome is confined to these rehabilitative functions, the confusion ars, and the accommodation syndrome serves [*48] a useful forensic function.

Myers, Expert Testimony, supra, at 67-68.

We have concluded that syndrome evidence proffered either generally or as related to a particular child to prove affirmatively that abuse occurred is scientifically unreliable. "Whether described in terms of 'indicators,' 'syndromes,' 'patterns or 'clinical features,' the objective of such evidence is to establish on the basis of present conduct that in the past someone has been subjected to a specific trauma." State v. Black, supra, 537 A.2d at 1157 (Me. 1988). Under ideal circumstances such a nexus is problematic. These circumstances are far from ideal. This record and our independent research evidence no general scientific approbation of such an analysis and a sharp difference of opinion among jurisdictions as to its reliability, thus obviating the conclusion that the affirmative use of syndrome evidence has gained "general" acceptance. We therefore hold that Milchman's unrestricted testimony that C. Q. and N. Q. exhibited four out of five elements of CSAAS and that N. Q. showed other trauma syndrome behaviors should not have been admitted to prove to the jury that abuse occurred because [*49] the reliability of that evidence to prove an occurrence of abuse has not as yet been established. See State v. Kelly, supra. This is not to suggest that such evidence is intrinsically flawed. We are in no position to make such an absolute judgment. Rather, we hold that as social science and jurisprudence are presently constituted, we can have no faith in its reliability. n10

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n10 Were this the only error in the case, we might have temporarily remanded it to the trial judge for the development of a full record on the reliability of syndrome evidence as affirmative proof of sex abuse prior to determining whether to reverse or affirm. Because a retrial is otherwise necessary, such a procedure is unwarranted.

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VI

Equally important in our determination is Milchman's testimony before the jury that she believed the stories told by the children (and C. W.) and her reasons for that belief. She stated on several occasions that it was her "expert opinion" that the children had been sexually abused. In addition to relying [*50] on the syndrome evidence she observed, Milchman's expert opinion was based in great measure on her conclusions as to the credibility of the children's recitation of events.

There is no basis in our law for the expression of an expert opinion as to the truthfulness of a statement by another witness. Such a statement does not fall within any of the methods provided in the Rules of Evidence for supporting the credibility of a witness. See R. Biunno, Current N. J. Rules of Evidence, ments to R. 20, 22, 47 (1991). Such testimony is quite distinct from racter evidence relating to the traits of honesty and veracity which is permissible under Evid. R. 22. On the contrary, in this case, the character of the child witnesses for truthfulness was never addressed by the expert. What was said was that the expert believed that particular statements of the witnesses were true. Our rules do not allow such bolstering.

Moreover credibility is an issue which is peculiarly within the jury's ken and with respect to which ordinarily jurors require no expert assistance. See, e.g., State v. Lindsey, supra, 149 Ariz. at 75, 720 P.2d at 76; Townsend v. State, supra, 734 P.2d at 709; [*51] State v. Holloway, 82 N.C. App. 586, 347 S.E.2d 72, 73 (Ct. App. 1986); State v. Friedrich, 135 Wis. 2d 1, 398 N.W.2d 763, 770 (1987).

> The question of whether a particular witness is testifying in a truthful manner is one that must be answered in reliance upon inferences drawn from the ordinary experiences of life and common knowledge as to the natural tendencies of human nature, as well as upon observations of the demeanor and character of the witness. The phenomenon of lying, and situations in which prevarications might be expected to occur, have traditionally been regarded as within the ordinary facility of jurors to assess. For this reason, the question of a witness' credibility has routinely been regarded as a decision reserved exclusively for the jury.
>
> It is an encroachment upon the province of the jury to permit admission of expert testimony on the issue of a witness' credibility. (Commonwealth v. Seese, 512 Pa. 439, 517 A.2d 920, 922 (1986) (citations omitted).

See Commonwealth v. Davis, 518 Pa. 77, 541 A.2d 315 (1988). Our cases [*52] are replete with references to the nature of a credibility evaluation; it involves a judgment by people of "reason and fairness," Johnson v. Salem Corp., 97 N.J. 78, 92 (1984), exercising the "rational process of an ordinarily intelligent mind," Ferdinand v. agricultural Ins. Co. of Watertown, N.Y., 22 N.J. 482, 494 (1956), applying "general knowledge and common experience." Id. We believe that it is an incursion on one of the jury's most important functions to allow an expert witness to evaluate the statements of another witness.

By far the most dangerous aspect of opinion testimony as to whether a witness is telling the truth is that it is scientifically unreliable. There is simply no scientific foundation for an expert's evaluation of the credibility of a witness or for the conclusion that a psychologist or other social scientist has some particular ability to ferret out truthful from deceitful testimony. Absent a question of capacity, an expert is no better qualified than a lay person to assess the credibility of a witness. See Biro v. Prudential Ins. Co., 110 N.J. Super. 391, 401 (App. Div. 1970), rev'd [*53] on dissent, 57 N.J. 204 (1970). Indeed, one commentator has characterized such Pseudo-Scientism as an ethical violation by the expert witness:

> The ethical violation occurs because of the implicit misrepresentation of a commonsense moral and legal judgment as a clinical or scientific decision. Whether a child is telling the truth is not a judgment based on specialized knowledge. Indeed, the counterexamples that are often given (i.e., cases in which children have given graphic descriptions of sexual acts) prove the point. The inference that such descriptions are credible is a matter of common sense. Even if the expert is correct in his or her judgment, the presentation of the judgment as based on specialized knowledge is deceptive, and the result is usurpation of the role of the trier of fact with concomitant diminution of the appearance of justice. (Limber & Melton, supra at 1230).

We are in agreement with this analysis as is nearly every other jurisdiction [illegible]ch has faced this issue. See, e.g., Nelson v. State, supra; Thompson v. State, 769 P.2d 997 (Alaska Ct. App. 1989); State v. Moran, supra, 151 Ariz. at 385, 728 P.2d at 255; [*54] State v. Lindsey, supra, 149 Ariz. at 474-75, 720 P.2d at 75-76; Logan v. State, 299 Ark. 255, 773 S.W.2d 419 (1989); People v. Oliver, 745 P.2d 222, 225 (Colo. 1987); In re Noel M., 23 Conn. App. 410, 580 A.2d 996, 1002 (App. Ct. 1990); Powell v. State, 527 A.2d 276, 279 (Del. 1987), Wheat v. State, supra; Tingle v. State, 536 So.2d 202 (Fla. 1988); Page v. Jordan, 564 So.2d 500, 502 (Fla. Dist Ct. App. 1990); Fuller v. State, 540 So.2d 182, 184 (Fla. Dist. Ct. App. 1989); Smith v. State, 259 Ga. 135, 377 S.E.2d 158, cert. denied, 493 U.S. 825, 107 L.Ed.2d 53 (1989); Stewart v. State, 555 N.E.2d 121 (Ind. 1990); State v. Brotherton, 384 N.W.2d 375, 378-79 (Iowa 1986); State v. Myers, 382 N.W.2d 91, 97 (Iowa 1986); State v. Wilson, 247 Kan. 87, 795 P.2d 336, 343-44 (1990); State v. Jackson, 239 Kan. 463, 470, 721 P.2d 232, 238 (1986); [*55] People v. Beckley, supra, 456 N.W.2d at 407; State v. Miller, 377 N.W.2d 506 (Minn. Ct. App. 1985); State v. Newman, 109 N.M. 263, 784 P.2d 1006 (Ct. App.), cert. denied, 109 N.M. 262, 784 P.2d 1005 (1989); State v. Bailey, supra, 89 N.C. App. at 219, 365 S.E.2d at 655; State v. Holloway, supra, 82 N.C. App. at 587, 347 S.E.2d at 73; State v. Boston, 46 Ohio St. 3d 108, 545 N.E.2d 1220, 1240 (1989); Lawrence v. State, 796 P.2d 1176 (Okla. Crim. App. 1990); State v. Milbradt, supra, 305 Or. at 629, 756 P.2d at 624; State v. Middleton, supra, 294 Or. at 437 n.11, 657 P.2d at 1221 n.11; Commonwealth v. Seese, supra; Commonwealth v. Garcia, supra; McCafferty v. Solem, 449 N.W.2d 590 (S.D. 1989); Duckett v. State, supra; Ochs v. Martinez, 789 S.W.2d 949, 956 (Tex. Ct. App. 1990); [*56] State v. Rimmasch, 775 P.2d 388 (Utah 1989); State v. Catsam, 148 Vt. 366, 534 A.2d 184 (1987); State v. Madison, supra; [illegible]phens v. State, 774 P.2d 60 (Wyo. 1989). But see State v. Busch, 515 So.2d [illegible] (La. Ct. App. 1987); State v. Myers, supra; State v. French, 233 Mont. 364, 760 P.2d 86 (1988); State v. Bachman, supra, 446 N.W.2d at 276. (State v. Kim, 64 Haw. 598, 645 P.2d 1330 (1982), was recently overruled in State v. Batangan, supra.) We have thus concluded that Milchman's expert testimony that the child witnesses and C. W. were telling the truth was improper.

VII

Under the circumstances, a reversal is warranted because of improper bolstering of the children's credibility and because the opinion that the children had been abused had no reliable basis. Milchman's opinion was based, in its entirety, on the affirmative use of syndrome evidence which we have ruled does not meet the reliability standard and upon her evaluation [*57] of the children's truthfulness, for which there is neither warrant nor scientific foundation.

We cannot say that this testimony was not influential in the jury's weighing of N. Q. and C. Q.'s testimony against defendant's denials. The evidence in this case was subject to varying interpretations. While Dr. Bresnahan stated that a stretched hymen was not normal and was consistent with sexual abuse, she also acknowledged that a girl could be born with a larger than usual hymenal opening. In our view, the improper admission of the expert evidence could have tipped the balance and created a real possibility of injustice, "one sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise [illegible]ht not have reached." State v. Melvin, 65 N.J. 1, 18-19 (1974) (quoting State [illegible] Macon, 57 N.J. 325, 335-36 (1971)). We thus reverse and remand for a new trial.

VIII

The retrial makes it unnecessary for us to deal with the other issues raised by defendant. We note only that the judge will have to decide at the time of the retrial whether the provisions of N.J.S.A. 2A:84A-32.4 are applicable and whether the [*58] testimony of the victim witnesses who will, by then, be more than three years older than they were at the original trial, should be received by closed circuit television. Maryland v. Craig, U.S. , 111 L.Ed.2d 666 (1990); State v. Crandall, 120 N.J. 649 (1990); State in Interest of B.F., 230 N.J. Super. 153, 159 (App. Div. 1989).

We note as well that there is ordinarily a lag between new advances in scientific research and the time that those advances are reflected in case law. It may be that during the pendency of this case, conclusions, as yet unpublished and unavailable to us, have been reached regarding the use of syndrome evidence including CSAAS in child sex abuse cases. We thus do not foreclose the presentation of such evidence to the trial judge on the retrial nor do we preclude the judge from reaching different conclusions than ours based upon the new evidence which might develop.

IX

In light of the state of social science research and case law as of this writing, we hold that CSAAS evidence is generally reliable to explain secrecy, belated disclosure and recantation by a child sex abuse [*59] victim; that syndrome evidence including CSAAS is not reliable to prove that sex abuse, in fact, occurred; and that an expert social science witness has neither the legal authority nor the scientific qualifications to opine as to the truthfulness of the statement of another witness.

Reversed and remanded.

DISSENTBY: STERN

DISSENT: STERN, J.A.D. (dissenting).

It is hard for me to disagree with a technically precise and well written opinion of the court. This is particularly true because I strongly believe that the criminal law must be approached with technical precision in an effort to assure equal justice. However, while I agree with much stated in the majority opinion, I am compelled to dissent in this case.

Prosecutors can be expected to remember their ethical responsibilities in assuring defendants a fair trial. But they cannot always be expected to offer evidence they believe in good faith to be reliable and admissible and to simultaneously request Evid. R. 8 hearings to determine those very questions. Our rules and cases require them to request Evid. R. 8 hearings, and suggest that they do so, only in certain situations. See e.g., State v. Hampton, 61 N.J. 250, 270-272 (1972); [*60] R. 3:13-1(b); Evid. R. 8. It is fundamental that the defense has an obligation to object to inadmissible evidence. Yet the majority reverses this conviction based on its technical determinations in the absence of any objection by the defense at trial to the witness' qualification "as an expert in child sexual abuse" or to the evidence offered and in the absence of any contest to its admissibility or probative value. I cannot agree with this conclusion.

Doctors can offer their opinions as to causation based on reasonable medical rtainty and without belief beyond a reasonable doubt. See State v. Smith, 210 N.J. Super. 43, 57-58 (App. Div. 1986), certif. denied 105 N.J. 582 (1986). Further, psychiatrists and psychologists treat patients based on their assessment of the cause of an apparent psychological problem. This frequently turns on their assessment of the patient's credibility. I cannot, therefore, understand why a psychologist, qualified as an expert without objection, cannot tell the jury what he or she believes to be the cause of an individual's problem. See, e.g., Rubanick v. Witco Chemical Corp., 125 N.J. 421 (1991); [*61] Evid. R. 56(2), 57. See also R.S. v. Knighton, 125 N.J. 79, 86-91 (1991) (regarding admissibility of statements to physicians relevant to diagnosis and treatment). Similarly, I do not understand why an expert, qualified without objection, cannot explain to a jury why the expert believes, based on observations and interviews of an individual, that that individual suffers from a particular syndrome and the scientific basis therefor. No one would think it unreasonable or inappropriate for Dr. Milchman or any other similarly qualified clinical psychologist to treat the Q. children for child abuse syndrome; yet the majority concludes that the doctors cannot tell a jury that those children have the syndrome. To me this puts technicalities above reason at a time our Supreme Court continues to enlarge the admissibility of expert testimony, subject to examination of the expert's credibility which may turn on the details of his or her experience and qualifications. See Rubanick v. Witco Chemical Corp., supra; Ryan v. KDI Sylvan Pools, Inc., 121 N.J. 276 (1991). As recently said in Lanzet v. Greenberg, 126 N.J. 168, 186 (1991),
[*62]

> In our recently-decided Ryan v. KDI Sylvan Pools, Inc., 121 N.J. 276, 579 A.2d 41 (1990), we noted that the primary function of courts is to determine the missibility of evidence, not its reliability. See James v. City of East Orange, 246 N.J. Super. 554, 588 A.2d 412 (App. Div. 1991) (once competency of medical expert has been established, the jury is to determine the credibility, weight and probative value of the expert's testimony').

I completely concur in the majority's thorough analysis that "rehabilitative" testimony concerning the impact of child sexual abuse syndrome is admissible. In fact, as the majority details, our Supreme Court has quoted with favor out-of-state authority to the effect that "by explaining the emotional antecedent of the victim's conduct and the peculiar impact of the crime on other members of the family, an expert can assist the jury in evaluating the credibility of the complainant." State v. R.W., 104 N.J. 14, 26 (1986), quoting State v. Myers, 359 N.W.2d 604, 610 (Minn. 1984). Hence, my colleagues and I agree that the testimony of [*63] Dr. Milchman concerning the characteristics and attitude of child abuse victims, including the possibility of initial false statements and delayed truthfulness, was admissible, even in the absence of an Evid. R. 8 hearing. I therefore join the court in holding "that CSAAS evidence is generally reliable to explain secrecy, belated disclosure and recantation by a child sex abuse victim," slip op. at 40, and was so admissible here.

The majority, however, holds that Dr. Milchman's testimony went beyond permissible bounds because she "did not limit her CSAAS testimony to the rehabilitative task of explaining the girls' secrecy and delayed reporting." Slip op. at 27. Rather, she detailed the symptoms of sexual abuse which N.Q. and Q. exhibited, indicating that those symptoms were the types exhibited by ctims of incest." Id. But if an expert can testify as to certain characteristics and impact of child sexual abuse, there is no reason why the expert cannot also testify as to what he or she observed with respect to the victim, as Dr. Milchman did. Nor should the expert be prevented from stating [illegible] Dr. Milchman did here by direct and hypothetical questions) his or her belief [*64] in terms of the impact of child abuse if there is other evidence which reflects that the individual, in fact, suffered from those symptoms. My colleagues conclude, however, that "the consensus among scholars is that there are as yet no scientifically reliable indicators of child sexual abuse," slip op. at 28, and that many, if not most, jurisdictions have concluded that "affirmative" "syndrome evidence" is not admissible because it is "without scientific basis." Slip op. at 30. Yet, the majority also recognizes the existence of cases which "have accepted the affirmative use of syndrome evidence." Slip op. at 31.

The major problem with my colleagues' analysis is that it summarily rejects the contrary precedent, but cf. Rubanick v. Witco Chemical Co., supra (referring in the toxic tort setting to admissibility when expert evidence is deemed reliable by a substantial minority of the scientific community), and substitutes its judgment for that of some experts because of a split of authority "and a sharp difference of opinion among jurisdictions as to its reliability, thus obviating the conclusion that the affirmative use of syndrome evidence has gained 'general' acceptance." Slip [*65] op. at 34. Nevertheless, my colleagues might remand for an Evid. R. 8 hearing "on the reliability of syndrome evidence as affirmative proof of sex abuse" if a retrial were not "otherwise necessary." Id., n.10. And the majority does not "foreclose the presentation of such evidence . . . on the retrial" or "preclude the judge from reaching different conclusions than ours based on the new evidence which might develop." Slip op. at 40.

My disagreement with the majority is on a relatively narrow ground: I would conduct the Evid. R. 8 hearing -- and permit both parties to develop the proofs regarding the scientific reliability of the affirmative CSAAS testimony -- before, not after, reversing the conviction. n1 Cf. State v. Kelly, 61 N.J. 283, 294-295 (1972); State v. Crandall, 231 N.J. Super. 124, 134 (App. Div. 1989), rev'd o.g. 120 N.J. 649 (1990); State v. Gunter, 231 N.J. Super. 34 (App. Div. 1989), certif. den. 117 N.J. 81 (1989). I would do so because in my view the other basis which the majority finds to make "a retrial . . . otherwise necessary" -- [*66] the expert's references to the credibility of the witnesses, even assuming it error in context -- might well be harmless, if the "affirmative" CSAAS syndrome evidence is deemed admissible. If an Evid. R. 8 hearing can be conducted next week or next month before (see R. 3:13-1(b)) or during the retrial mandated by the reversal, why cannot it be conducted next week or next month before the reversal is ordered? The hearing should be conducted now because the evidence may well be reliable and, therefore, admissible.

What constitutes reasonable reliability depends in part on the context of the proceedings involved. The policy underlying Rule 56 is to exclude expert evidence when the danger it poses of prejudice, confusion and diversion of attention exceeds its helpfulness to the factfinder because the expertise is not sufficiently reliable. In part, the Rule entails a weighing of reliability against prejudice in light of the context in which the evidence is offered. Expert evidence that poses too great a danger of prejudice in some situations, and for some purposes, may be admissible in other circumstances where it will [illegible] more helpful and less prejudicial. [State v. Cavallo, 88 N.J. 508, 520 (1982) [*67] (interpreting Evid. R. 56 as it then read)].

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n1 Had there been an objection to Dr. Milchman's qualifications or testimony, he could have endeavored to develop its reliability at trial. Dr. Milchman has aught and written articles on the subject. Cf. Rubanick v. Witco Chemical orp., supra.

------------------ -End Footnotes- ------------------

I recognize the independent obligation of the trial judge to assure a fair rial and to prevent "the danger of prejudice through the introduction of nreliable evidence." Id. at 518. But evidence can be shown to be sufficiently eliable by expert testimony, scientific writings or judicial precedent, id. at 21; see also e.g., Windmere Inc. v. International Ins. Co., 105 N.J. 373, 379 1987), n2 and "although the proponent of an expert opinion must demonstrate hat the data or information used were soundly and reliably generated and are of type reasonably relied on by comparable experts in the particular field, our ule [Evid. R 56(2)] does not insist on a demonstration of the objective *68] reliability of the opinions reached or the inferences drawn from such ata or information." Rubanick v. Witco Chemical Corp., supra, 125 N.J. at 447.

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n2 I do not suggest that the scientific literature or out-of-state precedent s so authoritative and persuasive as to render the affirmative CSAAS testimony dmissible without full exploration of the relevant issues at an Evid. R. 8 [illegible]ring. Compare, State v. Cathcart, 247 N.J. Super. 340 (App. Div. 1991).

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Evid. R. 56 was amended on September 15, 1981 effective July 1, 1982. See J.S.A. 2A:84A-33 et seq. In Ryan v. KDI Sylvan Pools, Inc., supra, the Supreme ourt considered the obligation of a trial judge in determining the dmissibility of expert testimony under the Rule, as amended. It said:

> We interpret Evidence Rule 56(2) to require that a court make an inquiry into nd a finding on whether experts in the given field rely on certain information. f such reliance be found, then it is presumed to [*69] be reasonable. That nterpretation of the Rule strikes a fair balance between the intent of the mended language and the "spirit" of the prior Rule, which has been interpreted o require the court to make a determination on the reliability of the estimony. The amendment was made explicitly to expand the data on which an xpert can rely in forming an opinion. The focus should be on what the experts n fact rely on, not on whether the court thinks they should so rely. Requiring he trial court to make a finding on whether experts in the field actually rely n certain information satisfies the intent of the new language. Allowing the ourt to overrule that presumption of reliability will result in the exclusion f evidence only under unusual or extreme circumstances, thus satisfying the spirit" of the former Rule. [121 N.J. at 289].

The victims of battered women syndrome appear to exhibit some characteristics [illegible]ilar to victims of child sexual abuse syndrome, as developed in the majority [illegible]ion; see also State v. Kelly, 97 N.J. 178, 190-197 (1984), and in Kelly, the [illegible]preme Court held "that the battered-woman's [*70] syndrome is an ppropriate subject for expert testimony; that the experts' conclusions, despite the relative newness of the field, are sufficiently reliable under New Jersey's standards for scientific testimony; and that defendant's expert was sufficiently qualified." Id. at 187. Hence, the Court remanded for a retrial at which, based on the same proofs, "the expert's testimony on the battered-woman's syndrome shall be admitted." Id. I recognize that there the victim was defending against a homicide charge and desired to use the evidence in support of her self-defense claim, whereas here the State seeks to use the expert proofs to show that a child was the victim of abuse. But Evid. R. 56 is party neutral even in a criminal case. See e.g., State v. Cavallo, supra; State v. Cary, 49 N.J. 343 (1967). See, generally Annot. "Admissibility, at Criminal Prosecution, of Expert Testimony on Rape Trauma Syndrome," 42 A.L.R. 4th 879 (1985 and 1991 supp.).

My colleagues appear to reverse the conviction now, in the absence of proofs or sufficient evidence in the literature or case precedent of scientific [*71] reliability, notwithstanding some judicial precedent they reject, because they also conclude that Dr. Milchman conveyed to the jury her belief that the victims were credible.

Dr. Milchman, the expert in child abuse syndrome, testified that she believed the victims, but she explained why, based on her observations and her scientific training and professional expertise. Her testimony related to her expertise and observations in reaching her ultimate conclusion. Dr. Milchman on direct was, in essence, discounting the contemplated defense. She said, "if the children give concrete, realistic details . . . that are plausible that is very suggestive that they have experienced" what they described. She explained how an expert can tell if a child is "programmed." When the judge interrupted this testimony - still in the absence of objection - and stated that credibility was for the ju[illegible] to decide, the prosecutor responded by saying, "I am talking about what the doctor's experience is and what she looks for." The judge immediately instructed the jury, "it is your ultimate responsibility as to credibility for that matter or even reliability as to the testimony that is being presented to you. [*72] That's from everybody including, of course, the infant witnesses." n3

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n3 Later, after developed on relevant cross-examination, Dr. Milchman also testified that C.W. did not "present to me as a programming mother." I emphasize that the testimony should be limited to the general characteristics of child sexual abuse syndrome and, if admissible, a conclusion that a particular person had those symptoms or characteristics. I do not want to be understood as approving direct expert testimony on the victim's credibility, and agree with the majority that such testimony is generally inadmissible. See, generally, Annot. "Experts-Rape Trauma Syndrome," supra, 42 A.L.R. 4th at 879-917; see also Annot. "Necessity and Admissibility of Expert Testimony as to Credibility of Witness," 20 A.L.R. 3d 684 (1968 and 1991 supp.). But to the extent Dr. Milchman's testimony was inadmissible because it went beyond what was admissible in explaining the syndrome and the factors she observed, it may be deemed harmless in context, in the absence of objection and with the above quoted instruction. The judge also instructed the jury regarding "fresh complaint" evidence and as to its duty to determine credibility, including credibility of the experts who testified, and that they were not bound by the expert testimon[illegible] In the absence of an objection to the jury instructions, I need not discuss t[illegible] further and cannot conclude that any deficiency constitutes plain error. See State v. Bethune, 121 N.J. 137, 148-149 (1990). Further, this direct appeal is the occasion to consider the claim of ineffective assistance of counsel, see e v. Dixon, 125 N.J. 223, 262 (1991); State v. Sparano, 249 N.J. Super. 411 (App. Div. 1991), notwithstanding his failure to object to the questions regarding credibility.

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If a prosecutor's investigator can tell the jury that he or she believes that controlled dangerous substances are packaged with intent to distribute, the critical issue in a case involving possession with intent to distribute, see State v. Odom, 116 N.J. 65 (1989), I do not see why experts cannot tell the jury that an individual is the victim of child sexual abuse syndrome in a case where the victim is alleged to have been sexually assaulted as a child. See Evid. R. 56(2), 57. Certainly the investigator in the Odom case is not directly commenting on the credibility of a state's witness but the distinction may be mor semantic than real in these circumstances. In any event, Dr. Milchman did not testify that defendant committed the crime or was guilty. The testimony was only that the children were victims of child sexual abuse, the "ultimate issue . . . to be decided by the trier of the fact." Evid. R. 56(3). Thus, if on remand it is determined that the expert can testify that C.Q. and N.Q. were the victims of child sexual abuse, I can find no harm flowing from the expert's testimony, stated in the absence of objection, to the extent it indicated [*74] that she believed the victims. The victims themselves testified that they were abused; the expert's opinion was consistent, similarly concluding that they were ims of child sexual abuse. n4 In these circumstances the expert's express ement of credibility offers little more than the obvious acceptance of their stories. I would therefore find it harmless that the expert may have been understood to say that she believed the children. Stated differently, if the "affirmative" CSAAS opinion evidence is found reliable and admissible at an Evid. R. 8 hearing, the fact that the expert also indicated that she found the children to have been credible would be harmless in my judgment.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n4 Dr. Bresnahan testified that N.Q. had a stretched or enlarged hymen. It was stipulated that C.Q. also had a stretched hymen, something which Dr. Bresnahan stated was "consistent with sexual abuse." There was no challenge to the physical evidence. The doctor stated that "based on the history that [N.Q.] gave me and the physical examination I would say it was consistent with sexual abuse." n5

n5 It is true that defense counsel harped on the credibility of N.Q. and C.Q. who also identified their father as the assailant. Counsel emphasized in summation that C.W. wanted to get even with defendant for his other relationships, for his years of abuse and then for having left her after she commenced a relationship with another man and had his child. The prosecutor, on the other hand, emphasized the children's credibility by reference to their reaction to the suggestion they lied and why defendant's theory was incredible. Defense counsel never mentioned Dr. Bresnahan or Dr. Milchman in summation. The ecutor referred to Dr. Bresnahan's testimony about a stretched hymen. As to CSAAS testimony, he said "you heard Dr. Milchman testify as to the Child Sexual Abuse Accommodation syndrome which some of you may look at well that's a psychiatrist, you know these people are crazy anyway. I don't believe in any of that garbage. Well, ladies and gentlemen it's up to you how you weigh an

expert's opinion. And the judge will instruct you on that." The prosecutor briefly referred to the syndrome evidence, stating "the Accommodation Syndrom deals with secrecy and helplessness and entrapment in accommodation and delayed disclosure. And every single one of those factors was present here." The children's credibility was therefore a critical issue in the case, but essentially related to whether there had been sexual abuse or a manufactured story. The prosecutor made no reference in his summation to Dr.Milchman's assessment of their credibility or to her belief that C.W. did not manufacture or teach the story. Rather, he addressed the children's credibility in terms of what they said about the suggestion they might lie, about the facts themselves and about the events on which the defense built its case. The doctor's assessment of their credibility, mentioned without objection during her testimony and not mentioned or highlighted in summation, was simply not capable of producing an unjust result or a result the jury would not have otherwise reached. State v. Melvin, 65 N.J. 1, 18-19 (1974); State v. Macon, 57 N.J. 325, 336 (1971); R. 2:10-2. (I need not here discuss the distinction in the test between constitutional and non-constitutional error). In any event, the comments on credibility need not be addressed or found as a basis for reversing this conviction before the admissibility of the affirmative CSAAS evidence is determined.
[*75]

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

To reverse this conviction in the absence of a determination of scientific reliability and without a remand to determine that issue, because an expert witness concluded based on her expertise that the children were victims of sexual abuse, is, in my judgment, inappropriate in the absence of the slightes objection or contest when the testimony was taken. n6

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n6 I would not reverse merely because of any violation of State v. D.R., 109 N.J. 348 (1988), because the testimony challenged thereunder would now be admissible. See Evid. R. 63(33). A retrial should not be ordered in these circumstances where the same evidence would be admissible on retrial. Cf. State v. Bethune, supra, 121 N.J. at 146. See also R.S. v. Knighton, supra, 125 N.J. at 97-98. In any event, I need not address the issues not addressed by the majority, although I do believe that the concurrent or consecutive nature of the sentences needs clarification.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -
[*76]

Accordingly, I dissent.

DAVID B. RUBIN, ESQ.

INSURANCE ISSUES AND ETHICAL CONSTRAINTS

I. BASIC COVERAGE ISSUES

- A. "Wrongful Act"
- B. "Occurrence"
- C. Contractual Liability Exclusion
- D. Uninsurable Matters
  - 1. Intentional Acts
  - 2. Punitive Damages
  - 3. Disparate Treatment v. Disparate Impact
- E. Indemnification of Employees

II. CHOICE OF COUNSEL/DEFENSE COSTS

III. INTERACTION WITH CARRIER

- A. Control of Defense
- B. Authorization to Settle

IV. ETHICAL CONSTRAINTS -- MULTIPLE REPRESENTATION

V. SPECIAL EDUCATION BENEFITS COVERAGE

Bd. of Educ., Yonkers City School Dist. v. CNA Ins., 839 F.2d 14 (2nd Cir. 1988)

New Madrid School Dist. No. 1 v. Continental Cas., 904 F.2d 1236 (8th Cir. 1990)

School Dist. for City of Royal Oak v. Continental Cas., 912 F.2d 844 (6th Cir. 1990)

Town of South Whitley, Ind. v. Cincinnati Ins. Co., 724 F. Supp. 599 (N. Ind. 1989), aff'd 921 F.2d 104 (7th Cir. 1990)

City of West Haven v. Hartford Insurance Co., 41 Conn. Supp. 548, 594 A.2d 495 (Conn. Super. 1990)

Board of Education of McNairy County v. Great Global Assurance Co., 1991 U.S. App. LEXIS 22366 (6th Cir. 1991)

Petition for Review of Opinion 552, 102 N.J. 194, 507 A.2d 233 (1986)

Continental Casualty Co. v. Canadian Universal Insurance Co., 924 F.2d 370 (1st Cir. 1991)

Andover Newton Theological School, Inc. v. Continental Casualty Co., 924 F.2d 370 (1st Cir. 1991)

Holbrook Unified School District No. 3, et als. v. California Insurance Co., 942 F.2d 791 (9th Cir. 1991) (full opinion at 1991 U.S. App. LEXIS 21123)

Chester County Intermediate Unit v. Pennsylvania Blue Shield and Capital Blue Cross, 896 F.2d 808 (3d Cir. 1990)

Jenkins v. State of Florida, 931 F.2d 1469 (11th Cir. 1991)

Solo Cup Co. v. Federal Ins. Co., 619 F.2d 1178 (7th Cir. 1980), cert. den. 449 U.S. 1033

School Dist. v. Mission Ins. Co., 58 Or. App. 692, 650 P.2d 929, petition den. 294 Or. 682, 662 P.2d 725 (1982)

650 P.2d 929 printed in FULL format.

School District No. 1, Multnomah County, Oregon, Respondent - Cross-Respondent, v. Mission Insurance Company, a California corporation; The Insurance Company of the State of Pennsylvania, a Pennsylvania corporation; and Stonewall Insurance Company, an Alabama corporation, Respondents - Cross-Appellants, and Cross-Respondents, Northwestern Pacific Indemnity Company, an Oregon corporation, Appellant - Cross-Respondent, School District No. 1, Multnomah County, Oregon, Respondent - Cross-Respondent, v. Northwestern Pacific Indemnity Company, an Oregon corporation, Appellant - Cross-Respondent, The Insurance Company of the State of Pennsylvania, a Pennsylvania corporation, and Stonewall Insurance Company, an alabama corporation, Respondents - Cross-Appellants, and Cross-Respondents.

No. A7707-09610, CA 15221 (Control), No. A7707-09611, CA 15222 (Cases Consolidated)

Court of Appeals of Oregon

58 Ore. App. 692; 650 P.2d 929 petition den. 294 Ore. 682, 662 P.2d 725

August 25, 1982, Filed; Argued and submitted July 15, 1981

IOR HISTORY:

Appeal from Circuit Court, Multnomah County. George A. Van Hoomissen, Judge. That portion of the judgment declaring that Northwestern Pacific Indemnity Co. had or has a duty to defend or to pay the Ledbetter, Speiginer, Vladimiroff, Zangwill and Bryant claims is reversed. The judgment declaring Northwestern's liability to Stonewall Insurance Co. is affirmed. The portion of the judgment declaring that Stonewall Insurance Co. and the Insurance Company of the State of Pennsylvania have or had a duty to defend any of the discrimination claims is reversed, as is that portion of the judgment holding Stonewall Insurance Co. and the Insurance Company of the State of Pennsylvania liable for the attorney fees of School District No. 1. The judgment is otherwise affirmed.

COUNSEL: Katherine H. O'Neil, Portland, argued the cause for appellant - cross-respondent. With her on the briefs were Kenneth E. Roberts, and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Mark C. McClanahan, Portland, argued the cause for respondent - cross-respondent. With him on the briefs were John R. Bakkensen, Michael E. Arthur, and Miller, Nash, Yerke, Wiener & Hager, Portland.

Arden E. Shenker, Portland, argued the cause for respondent - cross-appellant - cross-respondent, The Insurance Company of the State of Pennsylvania. With him on the briefs were Elizabeth A. Trainor, Lamar Tooze, Jr., and Tooze, Kerr, Marshall & Shenker, Portland.

James M. Callahan, Portland, argued the cause for respondent - cross appellant - cross-respondent Stonewall Insurance Company. With him on the briefs was Landis, Aebi & Bailey, Portland.

Scott F. Gilman, Portland, attorney for respondent - cross-appellant - cross-respondent Mission Insurance Company, joined in the brief of appellant - cross-respondent.

JUDGES: Before Gillette, Presiding Judge, and Warden, Judge, and Young, Judges. YOUNG, J. wrote the opinion. Warden, J., vice Roberts, J.

OPINIONBY: YOUNG

OPINION: YOUNG, J.

Defendant Northwestern Pacific Indemnity (Northwestern) appeals from the judgment of the trial court finding it obligated as primary carrier by its policy of comprehensive general liability insurance to defend School District No. 1 (district) on discrimination claims filed against the district and to indemnify the district for the amounts the district had agreed to pay in settlement of certain of those claims. Northwestern also contends that the trial court erred in holding that it was required to defend the district in a counterclaim brought by the Teachers' Retirement Fund Association (TRFA) and in awarding attorney fees and prejudgment interest. The Insurance Company of the state of Pennsylvania (ICSP) and Stonewall Insurance Company (Stonewall), the district's excess carriers, cross-appeal from that portion of the trial court's order holding them alternatively liable for defense and settlement costs and jointly and severally liable with the primary carriers for costs and attorney fees. The Mission Insurance Company (Mission), successor to Northwestern as the district's primary carrier, is no longer involved in this appeal. We affirm [illegible] part and reverse in part.

Northwestern insured the district under a primary comprehensive liability policy from July 1, 1970, to August 1, 1973. n1 That policy contained a provision that n1

n1 The pre-trial order worked out in the trial court has greatly facilitated review of this complex case.

"The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay on account of any claim for breach of duty made against the insured by reason of any negligent act, error or omission of the insured * * * and the company shall have the right and duty to defend any suit against [the insured] seeking damages on account of such breach of duty even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient * * *."
This provision is referred to as "errors and omissions" coverage. Mission provided similar coverage from August 1, 1973, to July 1, 1974. The excess carriers, ICSP and Stonewall, provided coverage from July 1, 1970, to July 1, 1972, and from July 1, 1972 to July 1, 1975, respectively.

Beginning in July, 1970, a number of complaints alleging employment discrimination within the periods covered by defendants' policies were filed against the district. The complaints were initially filed with the Bureau o[illegible] Labor (BOL), which investigated the complaints on behalf of the state, see O[illegible] ch 659, or with the Equal Employment Opportunity Commission (EEOC), which investigated discrimination claims under federal law, see 42 USC @ 2000 et seq (Title VII), or with both. A few of the complaints resulted in actions being led in state or federal court. n2

n2 Some of these court actions also involved claimed violations of the Equal Pay Act of 1963, 29 USC 206(d), and the Civil Rights Act of 1864. 42 USC @@ 1981 and 1983.

With one exception, defendants refused to accept the defense of and liability for any of the claims. The district undertook its own defense and in some cases reached monetary settlements with the claimants.

The trial court ruled that under the errors and omissions coverage of their policies Northwestern and Mission were obligated to pay the amounts the district had incurred in settlement of the discrimination claims to the extent that the conduct or condition complained of was committed or had occurred during the policy period of each, up to the policy limits. This is characterized as the duty to pay. The sums were allocated between Northwestern and Mission after a separate trial on damages.

The trial court also determined that Northwestern and Mission had a duty to defend the district as to each discrimination claim from the point in time when there was

"a) an action, suit or claim filed in Court or

"b) an administrative finding or determination (by the Oregon Bureau of Labor r the Equal Employment Opportunity Commission) of substantial evidence to pport the complaint or charge."
The primary carriers (Northwestern and Mission) were held jointly and severally liable for defense costs incurred by the district in defending the discrimination claims.

In addition, in 1972, the district brought a declaratory judgment action against TRFA seeking a determination of the legal status of the unassigned surplus of the fund subsequent to the pending merger of the TRFA with the Public Employment Retirement System. TRFA counterclaimed for the district's alleged wrongful failure to approve a variable annuity account as allowed by the legislature in 1969. See former ORS 239.210(1). In the proceedings that followed the trial court declined to rule on the counterclaim. After appeal to this court on the district's claim, School Dist. No. 1 v. Teachers' Retirement, 30 Or App 747, 567 P2d 1080 (1977), the case was remanded, and the parties reached a settlement. The district paid no money to TRFA as a result of that settlement.

Northwestern, ICSP and Stonewall were notified of the counterclaim against the district and declined defense of the action. The trial court in the instant proceeding determined that Northwestern's policy required that it defend the counterclaim and held Northwestern liable for the defense costs incurred by the district.

The court further determined that each excess carrier had a duty to pay the iscrimination claims arising from actions taken during its policy period to the tent that the sums exceeded the amounts recoverable under the policies of the rimary carriers. In addition, the court held that, if there was no coverage under the policies of the primary carriers, the excess carriers had both a duty to defend and a duty to pay the claims for discrimination occurring during their respective periods of coverage. The court also held the primary carri[illegible] liable to Stonewall for defense costs it had incurred in the defense of one of the discrimination claims. It awarded prejudgment interest to the district and held all defendants liable for costs and attorney fees pursuant to ORS 743.114.

DISCRIMINATION CLAIMS
1. Errors and Omissions Coverage

The duty to defend an insured under an insurance policy is broader than the duty to pay. The duty to defend arises whenever there is a possibility that the policy provides coverage for the claim made. The rule for determining whether there is a duty to defend was formulated in Ferguson v. Birmingham Fire Ins., 254 Or 496, 507, 460 P2d 342 (1969):

"* * * If the complaint, without amendment, may impose liability for conduct covered by the policy, the insurer is put on notice of the possibility of liability and it has a duty to defend. For example, in an action of trespass brought against the insured, if the complaint alleges a willful entry (in order to support a claim for punitive damages), the plaintiff could, without amending the complaint, recover ordinary damages for a non-willful entry. The insurer, therefore, would have the duty to defend. The innocent trespass may be treated as a 'lesser included offense' by analogy to the criminal law."

See Ross Island Sand & Gravel Co. v. General Ins. Co. of Amer., 472 F2d 750 (9th Cir 1973) (applying Oregon law); Casey v. N. W. Security Ins. Co., 260 Or 485, 490 P2d 208 (1971); 7C Appleman, Insurance Law and Practice @ 4682 et seq (1979).

Any doubts regarding coverage are resolved in favor of the insured. Continental Casualty Company v. Reinhardt, 247 F Supp 173 (D Or 1965), aff'd, 358 F2d 306 (9th Cir 1966). However, an insurer is not required to defend claims which, if proved, would provide no basis for recovery under the policy. 7C Appleman, Insurance Law and Practice @ 4684.01 (1979). The rules for interpreting insurance contracts are well established. The primary objective is to give effect to the intent of the parties. Denton v. International Health & Life, 270 Or 444, 528 P2d 546 (1974); Ramco, Inc. v. Pacific Ins., 249 Or 666, 439 P2d 1002 (1968). If the language is susceptible of more than one construction, the policy is construed most favorably to the insured. Wallace Co. v. State Auto. Ins. Co., 220 Or 520, 349 P2d 789 (1960); Rainey v. Northwest. Nat. Casualty Co., 44 Or App 43, 605 P2d 294 (1980).

Northwestern contends that the errors and omission provision in its policy

"* * * is designed to provide coverage exclusively for those types of legal
ob
gations which arise solely by virtue of a special risk inherent [in] and peculiar to the practice of the insured's profession."

It likens errors and omissions coverage to professional liability insurance and points out that there is nothing in a claim of employment discrimination that involves a risk inherent in or peculiar to the operation of a school district.

Although errors and omissions coverage is considered a type of professiona[illegible] liability insurance, see 7A Appleman, Insurance Law and Practice @ 4504.01, [illegible] 310 (1979), the cases upon which Northwestern relies involved policies which contained narrowing language not found in the policy issued by Northwestern. See, e.g., Grieb v. Citizens Casualty Company of New York, 33 Wis 2d 552, 148 NW2d 103 (1967) (coverage for errors and omissions "in rendering or failing to nder professional architectural services"); Strauss v. New Amsterdam Casualty Company, 30 Misc 2d 345, 216 NYS2d 861, 862 (1961) (coverage for claims "arising out of the performance of professional services for others in the insured's capacity as a lawyer"); Smith v. Travelers Indemnity Company, 343 F. Supp 605, 608 (MDNC 1972) (coverage for damages "arising out of the performance of professional services for others in the insured's capacity as a lawyer").

Although there was testimony by a claims representative of Northwestern and an underwriter for Mission that errors and omissions coverage generally is intended to cover risks inherent in the insured's profession, there was no evidence that that narrow meaning was intended or understood by the district. The language of the policy itself does not convey that restricted meaning.

The district contends that the terms should be given their plain, ordinary meanings. Even so, such terms may be considered "ambiguous in a legal sense in that they are general terms which could intended to have been used in a more or less narrow or broad sense, depending upon the intention of the parties." Chalmers v. Oregon Auto Ins. Co., 262 Or 504, 509, 500 P2d 258 (1972); Shadbolt v. Farmers Insur. Exch., 275 Or 407, 411, 557 P2d 478 (1976). We, therefore, interpret the terms "in the sense in which the insured had reason to suppose [they were] understood." Chalmers v. Oregon Auto Ins. Co., supra, at 509; Shadbolt v. Farmers Insur. Exch., supra.

Negligence is a want of due care; it is not intentional injury-causing conduct. Error is defined as "an act involving an unintentional deviation from ruth or accuracy; a mistake in perception, reasoning, recollection, or pression; * * * an act that through ignorance, deficiency, or accident departs from or fails to achieve what should be done." Webster's Third International Dictionary (1976). An omission is a lack of action, something neglected or left undone. Id. The policy specifically excludes "any dishonest, fraudulent, criminal or malicious act * * *."

Northwestern argues that it is against public policy to insure against intentional wrongdoing of an insured, see Nielsen v. St. Paul Companies, 283 Or 277, 583 P2d 545 (1978); Snyder v. Nelson/Leatherby Ins., 278 Or 409, 564 P2d 681 (1977); Isenhart v. General Casualty Co., 233 Or 49, 377 Or 26 (1962), n3 and that the policy should not be read to provide coverage for deliberate violations of the laws prohibiting discrimination in employment. It contends that intentional discrimination is not included in any reasonable meaning of the errors and omissions coverage.

n3 The public policy against insuring intentional wrongdoing of an insured was explained in Nielsen v. St. Paul Companies, supra, 283 Or at 281:

"* * * It is not sufficient that the insured's intentional, albeit unlawful, acts have resulted in unintended harm; the acts must have been committed for the purpose of inflicting the injury and harm before either a policy provision excluding intentional harm applies or the public policy against insurability attaches. Snyder v. Nelson/Leatherly Ins., 278 Or 409, 413-14, 564 P2d 681 (1977); City of Burns v. Northwestern Mutual, 248 Or 364, 369, 434 P2d 465 (1967)."

court went on to note that "[t]here are some intentional acts the nature of hich is such that it must necessarily be concluded that there was an intention to injure." But, the court stated, "[m]ere unlawfulness of the act does not raise any necessary implication that it was the actor's intention to injure."

283 Or at 281. See also A-1 Sandblasting v. Baiden, 293 Or 17, P2d (1982).

The district does not contend that errors and omissions coverage was intended to cover intentional injury but argues that claims of employment discrimination do not require a showing of intentional injury by the employer. It relies on Griggs v. Duke Power Co., 401 US 424, 91 S Ct 849, 28 L Ed 2d 158 (1971), for the proposition that

"* * * good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.

"* * * Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." (Emphasis in original). 401 US at 432.
However, the Supreme Court pointed out in Teamsters v. United States, 431 US 324, 335-36 n 15, 97 S Ct 1843, 52 L Ed 2d 396 (1977), that there are two theories of discrimination under Title VII:

"'Disparate treatment' * * * is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. * * *

"Claims of disparate treatment may be distinguished from claims that stress 'disparate impact.' The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. * * * Proof of discriminatory motive, we have held, is not required under a disparate impact theory. * * *"
See also Furnco Construction Corp. v. Waters, 438 US 567, 98 S Ct 2943, 57 L Ed 2d 957 (1978).

Although there do not appear to be any Oregon cases discussing this distinction between disparate treatment and disparate impact, and we have found no explicit disparate impact cases, we believe the Oregon statute is susceptible to that interpretation. Resolving any doubts in favor of the insured, we conclude that a claimant could state a cause of action under Oregon law for discrimination based on disparate impact. See School District No. 1 v. Nilsen, 271 Or 461, 477, 495, 534 P2d 1135 (1975); see also Hess v. Employment Div., 29 Or App 229, 562 P2d 1232 (1977).

In Solo Cup Co. v. Federal Ins. Co., 619 F2d 1178 (7th Cir), cert den 449 US 1033 (1980), a case also involving the duty to defend discrimination claims, the court determined that the insurance policy at issue in that case did not provide coverage for intentional discrimination because the policy definition of a covered "occurrence" extended only to unintentionally exposing complainants to discriminatory conditions. It did conclude, however, that there was potential coverage for claims alleging discrimination by disparate impact that do not require proof of discriminatory motive.

Although the policy provisions at issue here are different, we reach a conclusion similar to that reached by the court in Solo Cup. Northwestern's policy provides coverage for claims of breach of duty "by reason of any gligent act, error or omission of the insured." We do not believe that any reasonable reading of those terms could result in coverage for intentional discrimination. Discrimination by disparate treatment means treating an individual less favorably because of that individual's race, sex, color, religion, or national origin. It is the injury which must be intended. n4 Claims of disparate treatment are not covered.

n4 Because we decide that intentional discrimination is not covered by Northwestern's policy, we need not decide whether intentional discrimination would be uninsurable as a matter of policy.

However, claims of discrimination based on disparate impact, which do not require a showing of discriminatory intent, could encompass actions, judgments or decisions that might be considered negligent acts, errors or omissions under the policy. Discrimination claims containing allegations that could be interpreted as disparate impact claims, that is, that would allow the complainant to prove discrimination by disparate impact, are potentially within the coverage of the policy, and Northwestern had a duty to defend such claims if other policy requirements were met.

It might well be that a complaint could be construed as claiming either or both types of unlawful discrimination.

"* * * In case of doubt, as to whether or not the allegations of a complaint against an insured state a cause of action within the coverage of a liability licy sufficient to compel the insurer to defend the action, such doubt will ways be resolved in favor of the insured." Continental Casualty Company v. Reinhardt, supra, 247 F Supp at 174.
Although allegations in a discrimination complaint are broadly construed, sanchez v. Standard Brands, Inc., 431 F2d 455, 465-66, (5th Cir 1970), every charge is not all-encompassing. The complaint filed in a civil action on the basis of a complaint to the EEOC

"* * * is confined to those issues the original complaint has standing to raise, but may properly encompass any such discrimination like or reasonably related to the allegations of the charge and growing out of such allegations during the pendency of the case before the commission." King v. Georgia Power Company, 295 F Supp 943, 946-47 (ND Ga 1968).
The same limitations were applied to the complaint in School District No. 1 v. Nilsen, supra, under the Oregon Fair Employment Practices Act.

We now turn to an examination of each of the discrimination claims filed against the district for which Northwestern was held to be liable.
2. Individual Claims of Discrimination

The first claim is referred to by the parties as the "Sally Flury" claim, because it was initiated by a complaint filed with the BOL by one of the district's probationary teachers, Sally Flury. The dispute culminated in School District No. 1 v. Nilsen, supra. Flury complained that she had been discriminated against on the basis of sex, because the district's policy regarding probationary teachers required her to resign when she became pregnant, [illegible] that the district refused to grant her maternity leave, although the strict allows tenured teachers to take up to one school year of maternity leave.

The BOL found substantial evidence to support the charge of sex discrimination. After conciliation failed, the Attorney General, pursuant to ORS 659.060, n5 filed "Specific Charges of Discrimination," charging that the district's policy regarding pregnant probationary teachers constituted sex discrimination. The Commissioner found that the district had unlawfully discriminated. The Supreme Court found that the application of certain portions of the district's policy constituted unlawful sex discrimination but that other requirements under the policy were based on a bona fide occupational requirement.

n5 ORS 659.060 provides that if conciliation fails the "commission" shall cause charges to be prepared. Apparently the Attorney General actually prepares the charges.

Although this claim could be interpreted as a claim of disparate treatment, it is also possibly, and in fact probably, a claim of disparate impact. The failure of the district to recognize the discriminatory impact of its policy regarding pregnant probationary teachers and to continue to apply that policy to Sally Flury and others similarly situated could be considered an error or a negligent act. A showing of intent was not required. See School District No. 1 v. Nilsen, supra, 271 Or at 477, 495.

Northwestern also contends that it did not have a duty to defend these discrimination claims until there was a "suit * * * seeking damages" and that "suit" means a proceeding in a court. The trial court found the primary carriers liable for defense costs incurred from the time of a finding of substantial evidence to support the charge by the BOL or the EEOC.

As noted above, the primary consideration in interpreting insurance policies is to determine the intent of the parties, resolving ambiguities in favor of the insured. "Suit" is not defined in the policy. It can have several meanings. Webster's New International Dictionary (1976) defines "suit," in pertinent part, as "the attempt to gain an end by legal process; prosecution of right before any tribunal," and more narrowly as "an action or process in a court for the recovery of a right or claim: a legal application to a court for justice."

The policy provides that the insurer will "pay on behalf of the insured all sums which the insured shall become legally obligated to pay" on account of certain types of claims. The Commissioner of the BOL was authorized to enter an order requiring the district to compensate victims of discrimination for the pecuniary losses they suffered. See ORS 659.060; 659.010(2); Fred Meyer v. Bureau of Labor, 39 Or App 253, 592 P2d 564, rev den 287 Or 129 (1979); Williams v. Joyce, 4 Or App 482, 479 P2d 513, rev den (1971). n6

n6 In addition, it makes particular sense for the insurer to defend before the BOL, because the parties only get to court on appeal from what has occurred before the agency. ORS 659.085; see School District No. 1 v. Nilsen, supra; Fred Meyer v. Bureau of Labor, supra; Brady v. Bureau of Labor, 55 Or App 619, 639 P2d 673 (1982); Lewis and Clark College v. Bureau of Labor, 43 Or App 245, 602 P2d 1161 (1979), rev den 288 Or 667 (1980).

We believe that the term "suits" as used in Northwestern's policy is sufficiently broad to cover administrative proceedings before the BOL and the EEOC. See Safeway Moving & Storage Corp. v. Aetna Insurance Co., 317 F Supp 238 (ED VA 1970), modified 452 F2d 79 (4th Cir. 1971); see also Solo Cup Co. v.

Federal Ins. Co., supra, 619 F2d at 1188 n 7. The trial court determined that the duty to defend arose at the time of a finding of substantial evidence to support the charge by the BOL or the EEOC. That particular beginning point is not challenged by any party here. In the Sally Flury matter the defense costs Northwestern was ordered to pay were all incurred after a finding of substantial evidence to support the charge.

There is some authority that an insurer has no duty to defend a claim against an insured which seeks only injunctive relief. See 14 Couch on Insurance 2d @ 51:33 (1965); Annot., 53 ALR 2d 1132 (1957); Ladd Const. Co. v. Ins. Co. of North America, 73 Ill App 3d 43, 391 NE2d 568 (1979). While the original complaint filed with the BOL by Flury did not specifically ask for money damages, a reasonable reading of the complaint indicates that Flury sought to prevent the district from continuing to carry out its policy regarding pregnant probationary teachers, and also sought to recover the damages she sustained by the application of that policy to her. Her complaint stated that because of the discrimination of the district she would lose medical benefits, sick leave, seniority and other benefits. The allegations of the complaint could support an award of damages. n7

n7 The BOL in fact awarded monetary damages for humiliation, but that award was reversed by the Supreme Court for lack of evidence to support it. School District No. 1 v. Nilsen, supra, 270 Or at 484-86.

We conclude that the trial court's determination that Northwestern had a duty to defend the Sally Flury case was correct.

Northwestern was also held liable for defense of the claim of Virgie Harris. The Harris complaint alleged both race and sex discrimination. The BOL found substantial evidence to support the claim of sex discrimination but not of discrimination based on race. The allegation of sex discrimination was also based on the district's policy regarding pregnant probationary teachers. We conclude that Northwestern had a duty to defend that claim for the same reasons that it had a duty to defend the Sally Flury claim.

The Harris claim resulted in a settlement between the district and the complainant by which the district paid $3,150. The settlement agreement specifically stated that the district made no admission of liability and specifically disputes the legal basis underlying the claim. The duty to defend is, as noted above, broader than the coverage of the policy. Although the Harris claim presented a possibility of coverage raising the duty to defend, it might also have been shown that the discrimination complained of was in fact intentional and not the result of any act covered by the policy.

It appears that the question whether an insurer who has wrongfully refused to defend may later attempt to show that the insured's actions were not within the coverage of the policy has not been addressed in this state, see Snyder v. Nelson/Leatherby Ins. Co., supra, 278 Or at 412 n 12, n8 however, we are not now called upon to address that issue. Northwestern made no effort in the trial court to show that this settlement or any of the others reached by the district, was based on intentional discrimination by the district. Therefore, there is no basis in this record to determine that settlements made on claims that potentially involved actions covered by the policy actually were based on intentional unlawful discrimination. The trial court correctly held that Northwestern is liable for the costs of the defense and of the settlement in the Harris case.

n8 There is authority that the insurer is estopped to deny coverage after wrongfully refusing to defend. See 14 Couch on Insurance 2nd @ 51:54.

We next look at what the parties and the trial court have referred to as the Judith Dean case. This involved an initial complaint of discrimination filed with the BOL and the EEOC by 11 district employes who, along with other duties, coached girls' track. These 11 filed identical allegations of discrimination, charging that boys' track coaches were paid more than girls' track coaches and had better working conditions. After receiving a "right to sue" letter from the EEOC, the coaches filed suit in federal District Court, seeking an injunction and damages under Title VII and the Equal Pay Act of 1963, 29 USC @ 206(d). The action resulted in a judgment in favor of the district, the trial court concluding that the job of a girls' track coach was not substantially equal to that of a boys' track coach. n9

n9 The trial court concluded, after finding that the jobs were not substantially equal:

"Thus I need not decide whether the sex of either the athletes coached or the coaches themselves influenced the District's decision to pay coaches of the girls' track teams a lower salary. Nothing in Title VII or the Equal Pay Act authorizes me to redress what may be an excessive discrepancy in wages paid by an employer for merely comparable (though not substantially equal) work or jobs."
The Supreme Court has, however, recently held that the failure to give equal for equal work is not the only possible claim of discrimination in wage rates under Title VII, but that it could also be shown that even without a substantially equal job performed by a male for comparison, the employer intentionally paid females less because of their sex. County of Washington v. Gunther, supra.

Although it would be possible to show that the district intentionally discriminated against the girls' track coaches under those allegations, County of Washington v. Gunther, 452 US 161, 101 S Ct 2242, 68 L Ed 2d 751 (1981), a showing of intentional discrimination on the basis of sex is not necessary to the establishment of a violation. The complaints alleged that teachers who also coached girls' track received less than teachers who coached boys' track. Girls' track coaches are not necessarily women and, in fact, one of the plaintiffs in the suit was a male teacher.

We conclude that Northwestern had a duty to defend the Judith Dean case, because the complaints could be construed to allege discriminatory disparate impact. The defense costs claimed by the district as a result of the Judith Dean case included only those costs incurred after the filing of the action in federal court. There is no question, then, of whether defense costs incurred in defending the case before administrative agencies are recoverable. The district court complaint specifically sought damages as well as an injunction. The trial court was correct in its determination that Nothwestern had a duty to defend the district in the Judith Dean case.

Northwestern was also held liable for defense and settlement costs incurred by the district as a result of a complaint filed with the BOL and the EEOC by Marguerite (Norton) Ledbetter.Ledbetter alleged that she was employed by the district in 1955 to replace a male who had been designated as a carpenter. His duties consisted of making and repairing window shades.When she was hired, she performed the same duties as her predecessor but was designated a "window shade maker" and received a substantially lower wage than her predecessor and other male carpenters employed by the district who performed substantially equal work. The EEOC found substantial evidence of discrimination. Conciliation through the EEOC resulted in a settlement between the complainant and the district.

We do not believe that this can be interpreted as a claim of disparate impact. The claimant alleged that she was paid less than the male employe she replaced and less than the male carpenters with whom she worked, even though she performed the same job duties. That is not a claim that a facially neutral policy or practice resulted in women receiving lower pay. It is a claim that she received less than her coworkers and her predecessor because she was a woman. In order to prevail in a trial the complainant was required to show that the district paid her less because she is a woman. In this type of case the complainant must first make out a prima facie case of discrimination. The burden then shifts to the employer to show that there was a legitimate non-discriminatory reason for its actions. The complainant may then produce evidence that the reason given by the employer was merely a pretext for unlawful discrimination. McDonnell Douglas Corp. v. Green, 411 US 792, 93 S Ct 1817, 36 L Ed 2d 668 (1973); Furnco Construction Corp. v. Waters, supra; see School District No. 1 v. Nilsen, supra; Clackamas Co. Fire Protection v Bureau of Labor, 50 Or App 337, 624 P2d 141, rev den 291 Or 9 (1981). However,

> "[T]he central focus of the inquiry in a case such as this is always whether [illegible] employer is treating 'some people less favorably than others because of their race, color, religion, sex, or national origin." Teamsters v. United States, supra, at 355 n 15, 52 L Ed 2d 396, 97 S Ct 1843." Furnco Construction Corp v. Waters, supra, 438 US at 577.

The trial court erred in holding Northwestern liable for defense of the Ledbetter claim and for the settlement amount paid.

Teacher Julius Speiginer alleged race discrimination, involving harassment, job classification and discharge, in complaints to the BOL and EEOC and in a lawsuit in federal district court.The administrative claims were concluded by a settlement between Speiginer and the district in which the district paid Speiginer an amount of money. The lawsuit was still pending at the time of the trial of this case. The trial court held Northwestern partially liable for the settlement amount and for defense costs incurred and to be incurred in the lawsuit. The district did not claim defense costs for the administrative proceedings.

Speiginer's complaint filed with the BOL states:

> "I have been employed with the School District for five years.During that period, I have been harassed concerning my work and methods of teaching, etc. I believe this has occurred due to the fact that I am black."

The complaints filed with the EEOC are not in the record here. There is a "Notice of Charge of Employment Discrimination" that pre-dates the settlement agreement. It indicates that a charge of race discrimination was made, and there are checks in boxes specifying the nature of the charge as "terms and conditions" and "intimidation/reprisal."

Claims of harassment because of race must be claims of disparate treatment Harassment is not a facially neutral policy or practice which has merely a discriminatory impact, but a claim which, if the complainant is to prevail, requires a showing of intent. There is no basis for liability because of a negligent act, error or omission.The amount of the settlement between Speiginer and the district is not within Northwestern's errors and omissions policy coverage.

The Speiginer complaint in federal district court alleges, in pertinent part, that Speiginer was employed by the district as a teacher and satisfactorily performed the duties of that position but that, notwithstanding such satisfactory performance, the district "initiated and maintained a pattern and practice of harassment, humiliation, and ridicule against him, all on account of his race and color." It further alleged that he was forced to enter into an agreement to work as a warehouseman, n10

n10 This apparently refers to the settlement agreement in which Speiginer agreed to perform whatever duties the district required during the one year period in which he was being paid.

"all on account of his race and color, and in retaliation against him by [the district] for his objection to and protest of the unlawful employment practices against him complained of herein."
Again, this is a claim of intentional harassment and retaliation. Northwestern has no duty to defend this type of action under the terms of its policy.

We next turn to the complaints of three security guards employed by the district at the Portland Residential Manpower Center, Vivian Mathis, Lois Gate and Nina Kelly. Each of these women filed two complaints with the BOL, the first claiming sex and race discrimination and the second harassment because of the first complaint. The BOL found substantial evidence to support the claims. Apparently no damages were paid by the district, but Northwestern was held liable for defense costs. n11 The three have been considered together during the processing at the BOL and throughout the proceedings in the trial court in this case. We, therefore, consider them together.

n11 There was an indication in a question asked of counsel for the district that a settlement had been paid to these claimants. There was an objection that the question was leading, and that objection was sustained. The record contains no evidence that a settlement was reached and paid by the district, and none of defendants was required to pay any settlement that may have been made.

Two of the initial complaints state only that the complainants had been discriminated against on the basis of race and sex in salary and promotions.The third, however, states:

"Working as a security officer with four other officers, doing the same job but different hours, but I receive less pay and my days off have been changed three times within the past ten months without notification ahead of time to me. I feel I have been discriminated against because of my race and sex."
The allegations regarding pay and days off, although they could include a claim of disparate treatment, would also allow proof of a facially neutral practice policy of the district resulting in unintentional discrimination. Because tha possibility exists, the claims are within the errors and omissions coverage, and the trial court correctly held Northwestern liable for defense costs.

The last group of discrimination claims for which Northwestern was held liable involves four complaints filed with the BOL. The four are not related except by the fact that there was apparently no action taken on any of them after the filing of the complaints. The trial court held that Northwestern had a duty to defend those claims if and when they become "suits" as that term was interpreted by the trial court, that is, on the date on which substantial evidence of discrimination is found or the date on which a suit is filed in a court.

The first complaint filed by Linda Vladimiroff alleged that she was harassed because of her association with a black man and with another individual who had filed a discrimination complaint. We conclude that this is a claim of disparate treatment and is not, as it is now phrased, within the coverage of the Northwestern policy.

The second complaint was filed by Stanley Martin and stated: "Were told I could not go to school because I would not sign a pleage [pledge?] that was against my religion." Although it is difficult to discern the precise meaning of this claim, it appears that it could involve a practice of the district that is neutral on its face, but that has a discriminatory effect on members of a particular religion. It could involve actions within the purview of the errors and omissions coverage; if and when it evolves into a suit, Northwestern will have a duty to defend. n12

n12 Although this might not appear to be an employment discrimination claim, [illegible] was considered to be such a claim by the BOL; and we treat it as at least potentially a claim of employment discrimination.

The third complaint was filed by William Zangwill.

It states:

"On Thursday Feb. 3, 1972 I worked at Marshal High School. I was informed by a friend of mine that the Principal had informed her that neither she, nor anyone in her department, was to request my services as a substitute teacher again.

"After evaluating all the facts I have received, I am forced to conclude that this action was taken because of my national origin, and perhaps, my sex.

"I request the Civil Rights Division to investigate my complaint."
Again, we conclude that this claim is one of disparate treatment and not disparate impact. As it is now presented, the claim is not one which paises a duty to defend under the Northwestern policy.

The final discrimination complaint, filed by John Bryant, alleges race discrimination as follows:

"I feel that I was discriminated against due to constant harassment; I also feel that I have been de-evaluated because of supplies that was promised to me but were not given. This situation created a problem for me as a teacher and with my students.I am constantly being harassed by supervisors evaluating me as being incompetent.

"I feel that other black[s] are being treated the same way." As we have noted, harassment is not a facially neutral practice or policy. Racial harassment requires intent and is not within the errors and omissions coverage of the Northwestern policy.

3. Policy Conditions

In addition to the contention that there is no coverage for discrimination claims, Northwestern argues that it is not liable for some of the claims because the district failed to comply with certain conditions specified in the policy. The first is known as an "after trial" clause.It provides:

"No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined after actual trial or by written agreement of the insured, the claimant and the company."

An almost identical provision was in issue in Lamb-Weston et al v. Ore. Auto. Ins. Co., 219 Or 110, 341 P2d 110, 346 P2d 643 (1959), in which the court held that such a provision did not bar recovery against an insurer who denies liability and refuses to defend the insured. 219 Or at 116. The district's recovery is not barred by that provision of the policy.

Northwestern further contends that it did not receive timely notice of all of the claims. The policy requires:

"If claim is made or suit is brought against the insured, the insured shal immediately forward to the company every demand, notice, summons or other process received by him or his representative."

The pre-trial order includes in its "Agreed Facts-Discrimination Claims" section statements that the district timely notified Northwestern of the Sally Flury and the Judith Dean claims. As to the other claims for which we have held that Northwestern had a duty to defend, notice was given in a letter dated July 11, 1973. The district had been informed of the claims for the first time in October, 1972. We do not decide whether this ninemonth interval is a reasonable time to give notice under these circumstances, because Northwestern denied coverage of all of the claims on grounds other than failure to give notice. The rule in this state is:

"'A failure to give notice or furnish proofs of loss, or defects in the notice and proofs, are waived by a denial of liability on other grounds. * * *'" Eaid v. National Casualty Co., 122 Or 547, 558, 259 P 902 (1927); see Great American Ins. v. General Ins., 257 Or 62, 71, 475 P2d 415 (1970).

See also Lisch v. Aetna Cas. & Surety Co., 272 Or 593, 538 P2d 902 (1975). Northwestern denied coverage because the claims were not within the scope of errors and omissions coverage. It did not rely on inadequate notice. Any deficiencies in the notice were waived.

Summarizing, we conclude that Northwestern had a duty to defend and, where applicable, to pay, the Sally Flury, Virgie Harris, Judith Dean, Mathis, Gates and Kelly and Stanley Martin claims. It had no duty to defend, or pay, the Ledbetter, Speiginer, Vladimiroff, Zangwill and Bryant claims.

TRFA COUNTERCLAIM

In addition to the discrimination claims, the trial court also held that Northwestern had a duty to defend the counterclaim filed against the district by TRFA. The counterclaim sought damages for losses allegedly incurred after the district "wrongfully refused" to approve a variable annuity account as allowed by the legislature in 1969 and as requested by TRFA in 1971. The matter was settled without payment by the district.

The counterclaim was based on former ORS 239.210(1), which provided at the relevant times:

"Any board of trustees of an association under ORS 239.002 to 239.263 may, with the approval of the school district, establish a separate account to be known as the Variable Annuity Account." n13

n13 This section was amended in 1973 to provide that a variable annuity account could be established with 30 days' notice to the school district, deleting the requirement that approval be obtained.

The theory under which TRFA expected to recover from the district for "wrongfully refusing" to approve a variable annuity account is not entirely clear. n14

n14 The actions of a school district are subject only to limited review by the courts:

"* * * Courts can interfere only when the board refuses to exercise its authority or pursues some unauthorized course. * * * The wisdom or expediency of an act, or the motive with which it was done, is not open to judicial inquiry or consideration where power to do it existed. * * *." School District No. 17 v. Powell, 203 Or 168, 191, 279 P2d 492 (1955); see Padberg; West et al v. Martin et al, 225 Or 135, 357 P2d 255 (1960).

Counsel for the district in the School District v. TRFA case testified that the district's demurrer to the counterclaim was overruled. No court made a ruling on the merits of the claim.

However, the viability of that claim is not at issue here. Northwestern undertook to defend claims against the district within the policy coverage "even if any of the allegations of the suit are groundless, false or fraudulent * * *." While this undertaking does not expand the coverage of the policy, it does indicate that it is not only meritorious claims that raise the insurer's duty to defend. As noted above, any doubts as to the duty to defend should be resolved in favor of the insured.

We believe that under the allegation that the district "wrongfully refused" to approve the variable annuity plan TRFA would have been allowed to produce evidence that the failure to approve was the result of a negligent act, error or omission. Whether such a claim would be successful on a showing of intentional or negligent refusal is not a question we must decide. The duty to defend is based upon the determination whether, if successful, the claim could come within the coverage of the policy. The TRFA counterclaim could come within the errors and omissions coverage. Northwestern had a duty to defend.

PREJUDGMENT INTEREST AND ATTORNEY FEES

Northwestern next contends that it was error to award prejudgment interest on the amounts awarded the district. Interest on unliquidated damages for breach of contract is appropriate

"* * * where (1) the exact amount of damages is either ascertained or readily ascertainable, and (2) the time from which the interest runs is easily ascertaine
" Krieg v. Union Pacific Land Res. Corp., 269 Or 221, 234, 525 P2d 48 (1974). (Footnote omitted.)
See Public Market Co. v. Portland, 171 Or 522, 130 P2d 624, 138 P2d 916 (1943). The trial court ordered the interest to run from the date on which payments were made to the private counsel hired to defend the district and the dates on which the settlement payments were made by the district.

Northwestern did not contest the amounts paid by the district for the settlements or the amounts paid in defense costs. The pre-trial order contains in its "Agreed Facts -- Liabilities and Duty of Defense" section the following statement:

"8. If any or of all the discrimination claims and/or TRFA counterclaims are the subject of coverage under the primary insurers' (Mission and NW Pacific) errors and omissions coverage, such insurers, respectively, are liable up to the applicable policy limits for all sums which the District (1) became or in the future becomes legally obligated to pay thereon and (2) incurred or in the future incurs as a result of the insurers' failure to assume their right and duty to defend any suit thereon arising during their policy period."
At trial the district presented evidence of the amounts paid and testimony that such amounts were reasonable. The only real issue concerning the amount of t[illegible] damages was the allocation of the damages between the two primary insurers.

The fact that this type of issue requires resolution does not defeat a claim for prejudgment interest. See Isler v. Shuck, 38 Or App 233, 239, 589 P2d 1180 (1979); Public Market Co. v. Portland, supra; cf. Arden-Mayfair v. Patterson, 46 Or App 849, 613 P2d 1062, rev den 290 Or 149 (1980) (prejudgment interest not allowed where the parties "did not agree upon the amount in dispute"). The award of prejudgment interest to the district was proper.

Northwestern's final assignment of error as to the district is that the award of $40,000 in attorney fees was excessive. The evidence indicated that counsel for the district put in over 1,000 hours on the case and that the district had been billed $39,200 as of July 1, 1979, before the separate hearing on the cost bill and completion of the preparation of the judgment order. The district's expert witness testified that a reasonable fee would be $50,000 to $55,000. There was ample evidence to support the award of $40,000.

Northwestern's remaining assignments of error concern the portion of the trial court's order giving defendant Stonewall judgment against the two primary carriers for the amount of defense costs incurred by Stonewall in defense of the Judith Dean case and the award of attorney fees.

When the defense of the Judith Dean case was tendered to Stonewall by the district, Stonewall agreed to defend under a reservation of rights. The district exercised primary control through its retained counsel, however, and Stonewall participated only in various legal research projects and in the preparation of trial and post-trial memoranda. The trial court entered judgment in favor of Stonewall against the primary carriers in the amount of the defense costs incurred by Stonewall in its participation in the Dean case.

The policies of both of the excess carriers, Stonewall and ICSP, differed from the policies of the primary carriers. The coverage of the excess carriers is on an "occurrence" basis. "Occurrence" is defined as:

"(a) an accident, or (b) an event, or continuous or repeated exposure to conditions, which results during the policy period, in personal injury, property damage, or advertising liability (either alone or in combination) neither expected nor intended from the standpoint of the Insured."

The policy provides that the insurer will indemnify the insured for the "ultimate net loss" incurred because of "personal injuries," defined as:

"* * * bodily injury, sickness or disease, mental anguish, shock, disability, false arrest, false imprisonment, wrongful eviction, detention, malicious prosecution, discrimination, humiliation, invasion of right of privacy, libel, slander or defamation of character, including death at any time resulting therefrom." (Emphasis added.)

The term "ultimate net loss" is defined as:

"* * * the total sum which the Insured, or any company as his insurer, or both, becomes legally obligated to pay as damages, because of personal injury * * * either through adjudication or compromise, and shall also include hospital, medical and funeral charges and all sums paid as salaries, wages, compensation, fees, charges and law costs, premiums on attachment or appeal bonds, interest on judgments, expenses for doctors, lawyers, nurses and investigators and other persons and for litigation, settlement, adjustment and investigation of claims d suits which are paid as a consequence of any occurrence covered hereunder, cluding only the salaries of the Named Insured's or of any underlying insurer's permanent employees."

By endorsement, the policy provided:

"As respects occurrence covered under this policy, but not covered under the underlying insurance or under any other collectible insurance, the Company, shall:

"(a) defend in his name and behalf any suit against the insured alleging liability insured under the provisions of this policy and seeking damages on account thereof; even if such suit is groundless, false or fraudulent."

Northwestern argues that Stonewall defended the Dean case because it was required to do so under its own policy and that it has no right to subrogation for the expenses incurred in that defense. We disagree. When the primary carriers refused the defense of the Dean case, Stonewall had a duty to defend that case if there was a potential liability under its policy. We conclude that there was a possibility of coverage. "Personal injury" as defined specifically includes discrimination. As we have noted, the Dean claim did not require a showing of intentional discrimination.The claim then potentially came under the definition of an "occurrence" as "continuous or repeated exposure to conditions, which results * * * in personal injury * * * neither expected nor intended from the standpoint of the Insured."

Although some courts have held that the duty of the excess carrier to defend personal to each insurer and that an excess carrier is not entitled to reimbursement from a primary carrier for costs of defense, see, e.g., First Insurance Co. of Hawaii v. Continental Casualty Co., 466 F2d 807 (9th Cir. 1972); United States Fidelity & Guar. Co. v. Tri-State Ins. Co., 285 F.2d 579

(10th Cir. 1960); Maryland Cas. Co. v. American Family Ins. Group, 199 Kan 3 429 P2d 931 (1967), many courts have held that an excess carrier is entitled to subrogation. See Liability Assur. Corp. v. Indemnity Ins. Co., 228 F Supp 896 (D Md 1964); New Amsterdam Cas. Co. v. Certain Underwriters, 34 Ill 2d 424, 216 NE2d 665 (1966); Fidelity General Insurance Co. v. Aetna Ins. Co., 27 App Div 2d 932, 278 NYS2d 787 (1967); Standard Surety & Casualty Co. v. Metropolitan Cas. Co., 67 NE2d 634 (Ohio App 1945); Aetna Casualty & Surety Co. v. Buckeye Union Cas. Co., 157 Ohio St 385, 105 NE2d 568 (1952); Fireman's Fund Indem. Co. v. Freeport Insurance Co., 30 Ill App 2d 69, 173 NE2d 543 (1961); see also 7C Appleman, Insurance Law and Practice @ 4682, 28-37 (1979), and cases cited therein.

Northwestern had a duty to defend the Dean case and refused to do so. Stonewall had a potential liability under its policy of Northwestern was correct in denying its liability."Subrogation is a device adopted by equity to compel the ultimate discharge of an obligation by him who in good conscience ought to pay it." Jenks Hatchery v. Elliott, 252 Or 25, 31, 448 P2d 370 (1968). Although a "volunteer" is not entitled to subrogation, Stonewall had a legal interest of its own to protect and thus was not a volunterr. See Hult v. Ebinger, 222 Or 169, 352 P2d 583 (1960). Stonewall was entitled to reimbursement from Northwestern for the expenses incurred in defending the Dean case.

Northwestern's final contention is that Stonewall is not entitled to an award of attorney fees under ORS 743.114, which provides:

> "If settlement is not made within six months from the date proof of loss i filed with an insurer and an action is brought in any court of this state upo any policy of insurance of any kind or nature, and the plaintiff's recovery exceeds the amount of any tender made by the defendant in such action, a reasonable amount to be fixed by the court as attorney fees shall be taxed as part of the costs of the action and any appeal thereon. * * *"

Northwestern relies on General Acc. F. & L. Assur. Corp. v. Continental Cas. Co., 287 F2d 464 (9th Cir. 1961), construing a predecessor statute, former ORS 736.325. There the court held that

> "* * * the statute was not intended to cover actions brought by one insurance company as subrogee of rights against another insurer. That section, referring as it does to the failure to make 'settlement,' appears to contemplate a controversy directly between an insured and his insurer. We doubt that the legislature was concerned with the ability of an insurance company, suing as a subrogee, to recover attorneys' fees." 287 F2d at 468-69.

Stonewall, on the other hand, relies on Portland General Elec. Co. v. Pacific Indem. Co., 579 F2d 514 (9th Cir 1978), also applying Oregon law, where the court held that an excess carrier is subrogated to all of the insured's rights, including the right to attorney fees under ORS 743.114.

The Oregon Supreme Court has stated:

> "The purpose of ORS 743.114 allowing recovery of attorney fees by claimants under insurance policies is to encourage the settlement of such claims without litigation and to reimburse successful plaintiffs reasonably for moneys expend for attorney fees in suits to enforce insurance contracts. * * *" Chalmers v Oregon Auto. Ins. Co., 263 Or 449, 452, 502 P2d 1378 (1972).

In Groce v. Fidelity General Insurance, 252 Or 296, 448 P2d 554 (1968), the court allowed the plaintiffs, who had obtained a judgment against one of the endant's insureds for an amount in excess of the policy limits, to recover attorney fees under ORS 743.114 as assignees of the insured's rights under the policy. The action against the insurer was based on the wrongful failure to settle within the policy limits. The trial court had held that the actions were not "upon any policy of insurance" within the meaning of the statute. The Supreme Court held that the duty of an insurer to settle litigation within policy limits is a duty that arises out of the contract of insurance and that it would be consistent with the purpose of the statute to allow attorney fees in tha case.

In Fick v. Dairyland Insurance, 42 Or App 777, 601 P2d 868 (1979), Dairyland refused to pay a judgment entered against its insured. The injured party was compensated by his own insurer.Dairyland's insured assigned all her rights under her policy to the injured party and his insurance company, who then brought suit against Dairyland for the amount of the judgment. In holding that the plaintiffs were entitled to an award of attorney fees under ORS 743.114, we noted:

> "* * * [T]here is nothing compelling in the words of the statute itself that limits recovery of attorney fees to the insured or injured party or that excludes insurance companies from being entitled to he benefit of the public policy." (Footnote omitted.) 42 Or App at 781; cf. N. W. Marine Iron v. Western Casualty, 45 Or App 269, 608 P2d 199, rev den 289 Or 209 (1980).

We do not see any reason for treating a subrogee of the insured's interests der the policy any differently than an assignee.n15 We hold that the award of orney fees to Stonewall was proper.

n15 Fick suggests that an insurer acting as subrogee under ORS 743.783 would not be entitled to attorney fees under ORS 743.114. Stonewall here was not seeking recovery under ORS 743.783, but as an equitable subrogee of the rights of the insured.

We now turn to the cross-appeals by the excess carriers, Stonewall and ICSP. The trial court held that the excess carriers were liable for the defense and settlement costs incurred by the district in the discrimination claims if it should be determined that the primary carriers were not liable. Both excess carriers assign this holding as error.

We have found Northwestern liable on certain of the claims. Mission, the other primary carrier, did not appeal from the trial court's order holding it liable for certain claims, and that determination is not before us. As to the claims for which the primary carriers are liable, then, there is no issue remaining concerning the excess carriers.n16 The only claims to which this assignment is applicable are those claims for which we have held that Northwestern had no duty to defend or to pay. Those are the Ledbetter, Speiginer, Vladimiroff, Zangwill and Bryant claims. n17 We have held that those were claims of disparate treatment requiring proof of intentional discrimination. We must, therefore, consider whether the policies of the excess carriers provided or potentially provided coverage for such claims.

n16 It does not appear possible that any of the claims will exceed the policy mits of the primary carriers.

n17 Stonewall agreed to participate in the Speiginer defense under a reservation of rights.

The pertinent provisions of the policies are set out above.As noted, "personal injury" is defined to include discrimination. However, Stonewall and ICSP argue that the discrimination alleged does not come with the policy definition of an "occurrence," because it did not "unexpectedly and unintentionally" cause the injury to the complainants.

Although the coverage of the primary carriers and that of the excess carriers differs, we conclude that the excess carriers had no duty to defend the Ledbetter, Speiginer, Vladimiroff, Zangwill or Bryant claims for the same reasons that we concluded that the primary carriers had no duty to defend. The policies did not provide coverage for intentionally inflicted injuries. The definition of "occurrence" specifically excludes such injuries. See Solo Cup Co. v. Federal Ins. Co., supra.

The final assignment of error is that the trial court erred in holding the excess carriers jointly and severally liable for the attorney fees awarded to the district pursuant to ORS 743.114, because no money judgment was entered against Stonewall or ICSP in favor of the district. Because the excess carriers were not liable on any of the claims made against the district, an award of attorney fees against Stonewall and ICSP was improper.

That portion of the judgment declaring that Northwestern Pacific Indemnity Co. had or has a duty to defend or to pay the Ledbetter, Speiginer, Vladimiroff, Zangwill and Bryant claims is reversed. The judgment declaring Northwestern's liability to Stonewall Insurance Co. is affirmed. The portion of the judgment declaring that Stonewall Insurance Co. and the Insurance Company of the State [illegible] Pennsylvania have or had a duty to defend any of the discrimination claims is reversed, as is that portion of the judgment holding Stonewall Insurance liable for the attorney fees of School District No. 1. The judgment is otherwise affirmed.

SOLO CUP COMPANY, Plaintiff-Appellant, v. FEDERAL INSURANCE
COMPANY, Defendant-Appellee .

No. 79-1528

United States Court of Appeals for the Seventh Circuit

619 F.2d 1178; 22 Fair Empl. Prac. Cas. (BNA) 883; 22
Empl. Prac. Dec. (CCH) P30,825; 1980 Fire & Casualty
Cas.(CCH) P1201

ARGUED November 8, 1979
April 11, 1980

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 77 C 4540 -- Thomas R. McMillen, Judge .

OPINIONBY: PELL

OPINION:

Before PELL and BAUER, Circuit Judges , and DUMBAULD, Senior District Judge . *

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* Senior District Judge Edward Dumbauld of the Western District of Pennsylvania is sitting by designation.

PELL, Circuit Judge . This is an appeal by the plaintiff Solo Cup Company (Solo) from a judgment in favor of the defendant, Federal Insurance Company (Federal). Jurisdiction is based on diversity of citizenship. The district court concluded that the law of Illinois governed substantive questions, and the parties do not challenge this determination on appeal. The principal issue presented for review is whether the lower court erred in holding that there was a lack of coverage under an insurance policy for sums paid in settlement of an employment discrimination action brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. @@ 2000e-2000e-17 (1970 & Supp. II 1972).

I.

On January 24, 1974, Federal issued an "Umbrella Excess Liability Policy" to Solo which imposed both indemnity and defense obligations upon the insurer. The relevant indemnity provisions obligated Federal to secure Solo against any "ultimate net losses" n1 which it might suffer as a result of "occurrences" of covered "personal injuries."

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n1 Solo had no underlying insurance and Federal's liability, if found to exist, could be subject to a deductible of $10,000.

An "occurrence" was defined as

> [illegible] accident or happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury.... All such exposure to substantially the same conditions existing at or emanating from one premise or location shall be deemed one occurrence.

Policy Definition 5. (Emphasis supplied.)

The term "personal injuries" was broadly defined in Policy Definition 2 to include

Bodily injury, mental injury, mental anguish, shock, sickness, disease, disability, false arrest, false imprisonment, wrongful evictions, detention, malicious prosecuion, discrimination , humiliation; also libel, slander or defamation of character or invasion of rights of privacy....
(Emphasis supplied.)

Finally, covered "ultimate net losses" included not only sums the insured became obligated to pay through adjudication or compromise, but also

sums paid as salaries, wages, compensation, fees, charges and law costs, premiums on attachment or appeal bonds, interest, expenses for... lawyers... and for litigation, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder....
Policy Definition 6.

In addition to the inclusion of defense costs as a part of the ultimate net loss for which Solo was entitled to indemnity, however, there had been added to the policy "Endorsement No. 1 -- Supplementary Payments," which imposed the following separate and distinct defense obligation upon Federal:

It is agreed that, with respect to any occurrence not covered by the underlying policies... but covered by the terms and conditions of this policy... the company shall:

(A) Defend any suit against the insured alleging such injury... and seeki damages on account thereof, even if such suit is groundless, false or fraudulent....

While the policy was in force, Ann Willard, an employee in Solo's Atlanta, Georgia, facility, filed a charge with the Equal Employment Opportunity Commission (EEOC), in which she alleged that Solo's failure to promote her was sexually discriminatory. Thereafter, on May 6, 1976, the EEOC filed against Solo in the Northern District of Georgia an action seeking broad compensatory and injunctive relief for an alleged class of female discriminatees. The complaint included allegations of intentional discrimination.

Separately, on November 16, 1976, the General Services Administration (GSA) conducted an on site review of Solo's Grandview, Missouri, facility to determine whether Solo, as a government contractor, had complied with the mandate of Executive Order 11246 and its implementing regulations to refrain from employment discrimination. This compliance review resulted in an administrative allegation that Solo had discriminated against seventy-two female employees with respect to initial job placement. While the GSA proposed that Solo pay the alleged discriminatees $266,667 in backpay and interest as a basis for conciliation, the record does not indicate that any debarment proceedings have been commenced against Solo to date to enforce its alleged liability.

In a letter dated February 17, 1977, Solo advised Federal of both the EEOC action n2 and the GSA compliance review, and asserted that both matters were within the coverage of the policy. Federal immediately disclaimed coverage a to the EEOC matter, and thereafter asserted in its answer to plaintiff's amen complaint below that the GSA review was merely investigative and that Federal therefore had no obligation to defend.

n2 No issue is raised regarding the timeliness of the notice to Federal.

On May 4, 1977, Solo advised Federal of its intention to settle the EEOC litigation, and subsequently entered into a consent decree in the Northern District of Georgia. Pursuant to the terms of the decree, Solo paid the charging party, Anne Willard, $25,000. The decree recited, however, that its entry did not "constitute or operate as an acknowledgement or admission" that Solo had violated Title VII. Equal Employment Opportunity Commission v. Solo Cup Company, No. C 76-806 (N.D. Ga. May 31, 1977).

Solo then commenced this action seeking indemnity for legal fees, costs, and sums paid in settlement of the EEOC action, for legal fees paid in conjunction with the GSA review, and additionally a declaration of its right to indemnity for any sums paid as a result of the administrative claim of backpay liability.

The district court granted Federal's motion for summary judgment as to all issues. The court reasoned that Federal could have no indemnity or defense obligations toward Solo with respect to the EEOC action because the EEOC complaint contained allegations of intentional discrimination which were inconsistent with the policy definition of an insured "occurrence." With respect to coverage of the claims related to the GSA review, the court held that the insurer had no duty to defend against administrative procedures, and that the question of whether any claim resulting from the GSA review could constitute an insured occurrence did not present an actual controversy within the meaning of the Declaratory Judgment Act, 28 U.S.C. @ 2201, or Article III of the stitution, U.S. Const. art. III, @ 2.

II.

A.The EEOC Action

The contract of insurance at issue in this litigation imposed an absolute duty upon Federal to provide a defense in any actions filed against Solo charging the occurrence of an injury within the coverage of the policy. It is well settled under the law of Illinois that

> [this] duty to defend extends to cases where the complaint alleges several causes of action or theories of recovery against an insured, one of which is within the coverage of the policy while others might not be.

Maryland Casualty Co. v. Peppers, 64 Ill. 2d 187, 355 N.E.2d 24, 28 (1976) (emphasis supplied). An insurer may not refuse the tendered defense of an action unless a comparison of the policy with the underlying complaint shows on its face that there is no potential coverage. Weed v. Ohio Farmer's Insurance Co., 53 Ill. App. 3d 826, 368 N.E.2d 1310, 1312 (1977). In making the comparison any ambiguous or equivocal expressions in the policy will be strictly construed against the insurer. Pioneer Insurance Co. v. Alliance Insurance Co., 374 Ill. 576, 586, 30 N.E.2d 66, 71-72 (1940). See generally 7C Appleman, Insurance Law and Practice @ 4683 (1979).

Solo contends, however, that even if Federal's refusal to provide a defense was proper under the above described duty of defense and was therefore not a each of the agreement contained in Endorsement 1 of the policy, quoted supra , eral may nevertheless be required to indemnify Solo for the $25,000 paid in ttlement of the underlying action if, on remand, a trier of fact concludes that Solo's actions toward Anne Willard were not "intentional" within the meaning of the policy. Solo bases this argument on the premise that because the duties of indemnity and defense contained in the insurance contract are independent covenants, the mere fact that one covenant has not been breached does not preclude an opposite conclusion with respect to the remaining covenant.

While it is true that the obligations of indemnity and defense contained in the contract are independent of each other, we are unable to agree that Federal may, absent the existence of a duty of defense regarding the EEOC claim, have any obligation of indemnity for the sums paid in settlement of that claim. This follows from the fact that under Illinois law, a duty to defend such as is embodied in this contract of insurance, is broader than a general duty to indemnify for liabilities, fees, and costs.Colton v. Swain, 527 F.2d 296, 301-302 (7th Cir. 1975) (applying Illinois law).

The defense obligation is triggered when the insured tenders the defense of an action against it which is potentially within the policy coverage. By contrast, the indemnity obligation at issue here matures only when the insured becomes obligated to pay by reason of liability imposed by law. An insurer whose policy has an assumption of defense clause will therefore frequently have an independent duty to defend actions which will not ultimately result in an obligation to indemnify, either because the insured was not adjudged liable or because the facts were resolved in such a way as to bring the matter within a policy exclusion. n3 Conversely, litigation over the independent duty to indemnify will result only: (1) when the insurer has already defended the action under a reservation of rights, the insured has been found liable, and the insurer thereafter contests the coverage of the policy; or (2) when the policy contains no defense clause. If the broader duty to defend has not been triggered, it is because the underlying action is not potentially within the coverage of the policy, and there could be, as a practical matter, no duty to indemnify in such a situation.

n3 The proper course of action for an insurer who disputes coverage, but nevertheless has an obligation to defend an action is set forth in Maryland Casualty Co. v. Peppers, 64 Ill. 2d 187, 355 N.E.2d 24 (1976). The insurer should either seek a declaration of its rights in an independent action, or should defend under a reservation of rights, which it may do by assuming the defense, or, if necessary to avoid a conflict of interest, by means of independent counsel retained to represent the interests of the insured.

Therefore, because Federal refused to assume the defense of the EEOC action, our analysis here necessarily focuses on whether that refusal was a breach of the duty of defense covenant contained in Endorsement 1. In the event it was not a breach of that covenant of the insurance contract, our inquiry is at an end. If, however, we determine that the duty of defense was violated, the applicable Illinois law holds that the insurer is estopped to deny coverage, Aetna Casualty & Surety Co. v. Coronet Insurance Co., 44 Ill. App. 3d 744, 358 N.E.2d 914, 917 (1976), and provides for the following broad measure of damages to the insured: (1) the costs of defending the suit; (2) the amount recovered from the insured, either by way of judgment or settlement; and, (3) any additional damages caused by the insurer's breach of contract, see, e.g., J.L. Simmons Co., Inc. v. Fidelity and Casualty Co., 511 F.2d 87, 90 (7th Cir. 1975) (applying Illinois law); Weed v. Ohio Farmer's Insurance Company, 53 Ill. App 3d 826, 368 N.E.2d 1310, 1313 (1977); Sims v. Illinois National Casualty Co., Ill. App. 2d 184, 193 N.E.2d 123, 127 (1963); see generally 7C Appleman, Insurance Law and Practite @ 4683 (1979), again obviating any additional inquiry into the duty to indemnify.

Federal contends that its refusal of the tendered defense n4 was proper because the underlying EEOC complaint against Solo included the following allegation:

n4 Federal has not raised an issue as to the adequacy of the tender.

Since July 2, 1965, and continuously up until the present time, Defendant Company has intentionally engaged in unlawful employment practices at its Atlanta, Georgia facility, in violation of certain provisions of Title VII. These violations include, but are not limited to, the following:

1. Failing and refusing to promote women based on sex;

2. Compensating women at a lower rate than men for substantially the same work;

3. Maintaining job classifications segregated on the basis of sex;

4. Having different terms and conditions of employment for women based on sex; and

5. Discharging women in retaliation for exercising protected rights under Title VII.

(Emphasis supplied).

Reasoning that the extent of its obligation to defend should be measured by a comparison of the policy and the underlying complaint, Federal then argues that the act of the insured which is the subject of the suit must be an "occurrence." Because the policy defines an "occurrence" insofar as is relevant to this litigation as one which "unintentionally results in personal injury..." (Emphasis supplied), Federal therefore insists that the inclusion of the word "intentionally" in the underlying complaint negated coverage and relieved it of its duty to provide a defense. We do not agree.

While it is true that an insurance company's obligation to defend depends upon the underlying complaint against its insured, this obligation, as noted previously, is present whenever there appears to be a potential for coverage under the policy. Colton v. Swain, 527 F.2d 296, 302 (7th Cir. 1975) (applying Illinois law); Maryland Casualty Co. v. Peppers, 64 Ill. 2d 187, 355 N.E.2d 24 (1976); Weed v. Ohio Farmer's Insurance Co., 53 Ill. App. 3d 826, 368 N.E.2d 1310 (1977). Where, under the allegations of the pleadings against the insured, "an insured's liability exists on one theory as well as another and one of them brings the liability within coverage, we think the insured may avail himself of the insurance protection." United States Steel Corporation v. Hartford Accident & Indemnity Co., 511 F.2d 96, 99 (7th Cir. 1975) (emphasis supplied) (applying Illinois law).Especially since the advent of notice pleading, in a case where there is doubt as to whether a theory of recovery within the policy coverage has been pleaded in the underlying complaint, the insurer must defend, and its defense obligations will continue until such time as the claim against the insured is confined to a recovery that the policy does not cover. Carboline Company v. Home Indemnity Company, 522 F.2d 363, 366-367 (7th Cir. 1975) (analyzing Illinois law).

To hold otherwise would be to place upon the insured the burden of demonstrating in advance of the underlying litigation which of the competing theories of recovery against it was applicable for purposes of insurance, thereby frustrating one of the basic purposes of such a clause in the insura contract -- protection of the insured from the expenses of litigation. Aetna Casualty & Surety Co. v. Coronet Insurance Co., 44 Ill. App. 3d 744, 358 N.E.2d 914 (1976).

The underlying complaint filed against Solo by the EEOC seemingly alleges a full panoply of offenses under Title VII. Although based upon a promotional claim filed by a single employee, it includes class allegations n5 of sex based discrimination in compensation, promotional opportunities, and job placement, as well as general allegations of discrimination in terms and conditions of employment.

n5 The EEOC complaint was filed before the decision in EEOC v. D.H. Holmes Co., Ltd., 556 F.2d 787 (5th Cir. 1977), cert. denied , 436 U.S. 962 (1978). In that case, the Fifth Circuit held that when the EEOC alleges class discrimination and seeks relief for "those persons adversely affected," the suit is a class action and the EEOC must comply with the requirements of Rule 23.

A Title VII plaintiff may establish a violation under either the "disparate treatment" or the "disparate impact" theory. As the Supreme Court observed in International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977):

> "Disparate treatment"... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin....
>
> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity....

Id.

In our opinion, the allegations in the underlying EEOC complaint were so general that the EEOC would in all likelihood have been permitted to proceed under either theory. An analysis of the question of whether a disparate treatment claim would have been within the coverage of the policy necessitates an examination of the burdens of proof articulated for that type of action in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), and its progeny.In order to establish a prima facie case under the disparate treatment theory, a plaintiff is required to show the following: (1) that he or she belongs to a protected group under the statute; (2) that he or she applied and was qualified for the job or promotion for which the employer was considering applicants; (3) that despite his or her qualifications, the applicant was rejected or was not promoted; and (4) that after the plaintiff's rejection, the employer continued to seek or consider applicants of the plaintiff's qualifications.

In Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978), the Court defined the exact scope of the prima facie case, noting that it was not the equivalent of a finding of discrimination, but rather raises an inference tha the defendant's acts, if not otherwise explained, were more likely than not based on a consideration of impermissible factors. The burden that shifts thereafter to the employer is consequently one of articulating a legitimate, nondiscriminatory reason for its employment decision. Board of Trustees of

Keene State College v. Sweeney, 439 U.S. 24 (1978). If the employer meets this burden, the plaintiff will then be given an opportunity to introduce evidence that the employer's proffered justification is a mere pretext for discrimination.

What emerges from an overview of the above burdens is that proof of discriminatory motive is critical in a disparate treatment action. International Brotherhood of Teamsters v. United States, supra, at 335-36 n.15. The establishment of a case under McDonnell Douglas is equated with proof of motive because

> we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration.

Furnco Construction Corp. v. Waters, supra , at 577.

While the concepts of motive and intent are not identical, we think in the narrow context of determining the scope of coverage under this insurance policy, there is a similarity. The policy definition of an insured occurrence would extend only to a liability incurred by reason of Solo's unintentionally exposing women to discriminatory conditions. The extent of this coverage is therefore inconsistent with liability predicated on the disparate treatment theory since such a liability would necessarily involve a determination that Solo acted with a discriminatory motive or purpose.

We reach the opposite conclusion, however, with respect to the disparate impact theory, which is employed to analyze the validity of employment practices which are fair and neutral in form, but discriminatory in operation. The basic legal standards utilized in a disparate impact analysis were developed in Griggs v. Duke Power Co. 401 U.S. 424 (1971), and amplified in Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975). Proof of motive is not required. International Brotherhood of Teamsters v. United States, supra, at 335-36 n.15.

In order to make out a prima facie case of discrimination under the disparate impact theory, the plaintiff is required to show only that the employer utilized a facially neutral criterion which resulted in selecting applicants for hire or promotion in a significantly discriminatory pattern. Once the employment standard is so shown to be discriminatory in effect, the employer then must meet the burden of showing that its standard bears a manifest relation to the job in question. If the employer can demonstrate the job relatedness of its standard, the plaintiff may then show that other selection devices without a similarly discriminatory effect will also serve the employer's interest in maintaining an efficient workforce.

Solo contended at argument that the basis of the underlying claim against it was in fact a disparate impact claim based on its policy of requiring sales experience as a prerequisite for certain promotions. This policy, according to Solo's summary of the EEOC's position in the underlying action, disqualified disproportionate numbers of women, who, as a group, tended not to have the required experience.

While there is nothing in the record below to enable us to make a clear determination of whether the EEOC's complaint was in fact aimed at such a policy, we cannot, as noted previously, hold that the EEOC complaint did not contain a potential disparate impact claim. Since disparate impact liability does not require proof of discriminatory motive, and since Federal has, moreover, conceded that the policy covers at least some types of disparate impact claims, n6 we therefore hold that the disparate impact claim which could have been proved under the allegations of the underlying complaint was a claim potentially within the coverage of the policy. Consequently, under Illinois law, Federal has breached its duty to defend its insured in the action. See generally Maryland Casualty Co. v. Peppers, supra , at 28.

n6 Although it might seem that Federal's argument carried to its logical extreme would result in its purported coverage of "discrimination" as being without any real meaning, Federal argues otherwise, pointing out that there are instances of vicarious liability imposed by Title VII, caused by the acts of others, which liability is therefore unintentional as to the insured. We regard this approach as so narrow as to leave little real meaning to the purported coverage.

The final issue to be considered with respect to the EEOC claim is whether our construction of the policy to include coverage of disparate impact liability would, as Federal contends, render the insurance contract violative of the public policy against employment discrimination embodied in Title VII. It is well settled that "[a] contract of insurance to indemnify a person for damages resulting from his own intentional misconduct is void as against public policy and the courts will not construe a contract to provide such coverage." Industrial Sugars, Inc. v. Standard Accident Insurance Co., 338 F.2d 673, 675 (7th Cir. 1964). This rule is based on the simple principle long ago stated [illegible] Judge Cardozo, that "no one shall be permitted to take advantage of his own wrong." Messersmith v. American Fidelity Co., 232 N.Y. 161, 133 N.E. 432 (1921). Placing a limitation on the clear meaning of an insurance contract due to policy considerations, is, however, a restraint on the rights of private parties to fashion their own contract, Union Camp Corp. v. Continental Casualty Co., 452 F.Supp. 565, 568 (S.D. Ga. 1978), and is a step which courts have taken only where contracts were argued to extend coverage to the knowledgeable and intentional, or the criminal wrongdoer. Hartford Life Insurance Co. v. Title Guarantee Co., 520 F.2d 1170 (D.C. Cir. 1975); 1 Couch on Insurance 2d @ 1.36 (1959 & Supp. 1978).

Because we have construed the policy to exclude coverage of disparate treatment liabilities, we do not consider whether the degree of motive which must be proved in that type of action would be equivalent to a knowledgeable and intentional wrong such as would void policy provisions purporting to cover those claims.

With respect to the coverage of disparate impact liabilities, there is clearly no basis for voiding or limiting the contract. An insured may incur liability or become involved in litigation under that theory as a result of its utilization of any of a variety of seemingly neutral selection criteria. We note our agreement with the opinion of the Court of Appeals for the Sixth Circuit in L'Orange v. Medical Protective Company, 394 F.2d 57, 60 (6th Cir. 1968), where that court, interpreting Ohio law, observed that "the violation [illegible] public policy is measured by the tendency of the contract to injure the publi[illegible] good rather than by actual injury under the particular circumstances."

We do not think that allowing an employer to insure itself against losses incurred by reason of disparate impact liabilities will tend in any way to injure the public good, which we equate here with that equality of employment opportunity mandated by Title VII. To the contrary, the fact of insurance may be helpful toward achieving the desirable goal of voluntary compliance with the Act. The statistical proofs in disparate impact actions, most particularly those involving employment testing, have become increasingly complex, and employers now often retain batteries of experts to validate their selection criteria. Such complex analyses of employment standards, while apparently necessary in order to ensure that an employer's policies do not needlessly place a stumbling block in the way of women or minorities, may well become, as a practical matter, beyond the financial capabilities of all but the largest employers. The involvement of insurance in the field might, however, ease the burden on smaller employers by making claim prevention services available on a cost effective basis to help employers evaluate their employment standards. Workmen's compensation insurers have, by way of analogy, no doubt helped prevent numerous employee injuries, and it is not undesirable, nor inconceivable, that discrimination insurers might aid in preventing the injury of discrimination as well.

Because we have held that Federal breached its duty to defend its insured in an acton which was potentially within the coverage of its policy, and because there is no public policy reason for limiting the contract, Solo is entitled under Illinois law to damages in the amount of the costs and fees involved in defending the action, and the sums paid in settlement of the claim, less the policy deductible.

The GSA Review

Solo also seeks a declaration that it is entitled to have Federal provide a defense with respect to the allegations of sex discrimination made by the GSA in its compliance review. It additionally seeks indemnity for the $3,750 in legal fees and costs already expended during the review, and further seeks a declaratory judgment that any sums it becomes obligated to pay as backpay to female employees in the facility which was the subject of the GSA review will be within the indemnity coverage of the policy.

Dealing with these contentions in order, our review of the record does not indicate that Federal's defense obligations have been triggered by the events to date surrounding the compliance review. Our determination rests upon the fact that the only "claim" which has so far been made against Solo is an administrative proposal n7 that Solo pay some $266,667 in allegedly due backpay as a basis for conciliation . Solo, has, however, refused to conciliate upon this basis. Moreover, this excerpt from a letter from Solo to Federal dated May 19, 1977, is itself illustrative of the remote and indeed speculative nature of any claims which might be made against Solo:

n7 In the GSA matter there are no adjudicatory proceedings taking place in any forum; therefore we leave for another day the question of whether the duty to defend imposed by the provisions of the policy is necessarily confined to judicial proceedings. We do note, however, that the duty to defend in Endorsement 1 obligates the insurer to "defend any suit against the insured." The indemnity provisions of the policy, by contrast, obligate the insurer to indemnify Solo for all sums paid by reason of liability imposed "by law." In light of this language in the indemnity provisions, we think that the duty to defend "suits" might in some circumstances be triggered by adjudicatory proceedings before an administrative body. This conclusion follows from the fact that under Illinois law, the duty to defend, while independent of the duty to indemnify, is the broader of the two. Further, the word "suit" contained in the defense provision is ambiguous, see, e.g., Webster's New Unabridged International Dictionary (2d ed.) (defining "to sue" as "to seek justice or right... by legal redress"), and must therefore be construed liberally in favor of the insured. J.L. Simmons Co., Inc. v. Fidelity & Cas. Co., 511 F.2d 87, 90 (7th Cir. 1975).

Solo Cup Company denies that it is guilty of any such [backpay] deficiency because there are a number of available defenses to the allegation and in any event believes that the amount claimed is greatly exaggerated. As a result of refusing to conciliate this matter, it is anticipated that some time in the future there will be a hearing with respect to Solo's right to continue as a government contractor and there might be an action filed to seek backpay. (Emphasis supplied.)

Because we have held that Federal's broad duty of defense has not yet been triggered, we must examine the question of whether Solo might be entitled to reimbursement of the $3,750 of fees and costs expended to date in conjunction with the review under the indemnity provisions of the policy. Because there have been no formal proceedings against Solo, and therefore no "liability imposed upon the Insured by law" as required by Paragraph 4 of the indemnity coverage, we hold that it is not so entitled at this time.

Finally, we are in full agreement with the district court that the question of whether Solo would be entitled to indemnity for sums paid to female employees in any actions which might be brought either to debar Solo as a federal contractor or to seek backpay for alleged discriminatees is not ripe for adjudication. The Declaratory Judgment Act, 28 U.S.C. @ 2201, provides for a remedy only in cases of "actual controversy." The mere possibility that proceedings might be commenced against an insured regarding an act of the insured's as to which the insurer might contest coverage, is not sufficient to create a controversy within the meaning of either the Declaratory Judgment Act or Article III of the Constitution.

The district court erred, however, in granting the insurer's motion for summary judgment as to the GSA related allegations. The appropriate remedy where an action is found not to constitute a controversy is not judgment but dismissal. Fed. R. Civ. P. 12(h)(3).

REVERSED AND REMANDED, for entry of a judgment on Count I and an order of dismissal on Count II consistent with this opinion. The judgment of this court shall include costs to the appellant.

27TH CASE of Level 3 printed in FULL format.

CONTINENTAL CASUALTY CO., Plaintiff, Appellee, v. CANADIAN UNIVERSAL INSURANCE CO., Defendant, Appellee. THE UNIVERSITY OF MASSACHUSETTS, Defendant, Appellant. CONTINENTAL CASUALTY CO., Plaintiff, Appellee, v. CANADIAN UNIVERSAL INSURANCE CO., Defendant, Appellant

Nos. 90-1406, 90-1491

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

924 F.2d 370; 1991 U.S. App. LEXIS 1049; 54 Fair Empl. Prac. Cas. (BNA) 1606; 55 Empl. Prac. Dec. (CCH) P40,524

January 25, 1991

SUBSEQUENT HISTORY: As Amended January 28, 1991. As Amended January 30, 1991.

PRIOR HISTORY: [**1]

Appeals from the United States District Court for the District of Massachusetts; Hon. Rya W. Zobel, U.S. District Judge.

COUNSEL: Terence P. O'Malley with whom William E. Searson was on brief for University of Massachusetts.

Edward L. Kirby, Jr. with whom John D. Lychak, David J. Gorman and Hennessy, Killgoar & Ronan were on brief for Canadian Universal Insurance Company.

Patricia A. Gotschalk with whom John W. Scott, Drinker, Biddle & Reath, Terrance Hamilton and Casner & Edwards were on brief for Continental Casualty Company.

JUDGES:

Toruella, Circuit Judge, Bownes, Senior Circuit Judge, and Woodlock, District Judge.*

*Of the District of Massachusetts, sitting by designation.

OPINIONBY: BOWNES

OPINION: [*371] BOWNES, Senior Circuit Judge

This is an appeal from a summary judgment order of the district court in a declaratory judgment action brought by plaintiff-appellee Continental Casualty Company ("CNA") against appellants Canadian Universal Insurance Company ("CUI") and the University of Massachusetts ("UMass", "the University"), which was insured by both companies. CNA sought a declaration that CUI was obligated to indemnify UMass for amounts paid to satisfy a judgment in Irvine v. University f Massachusetts, No. 80-2532-Z (D. Mass. Feb. 27, 1985) [**2] ("Irvine") d for the amount paid in settlement in Bagley v. Hoopes, No. 81-1126-Z (D. Mass. filed May 1, 1981) ("Bagley"). CUI denied coverage and counterclaimed that it was CNA that owed indemnification to UMass; UMass crossclaimed against CUI and counterclaimed against CNA seeking indemnification.

On motions for summary judgment filed by all parties, the district court granted CNA's motion with respect to the Irvine and Bagley coverage, granted CUI's motion with respect to Bagley, and denied UMass' motion with respect to both Irvine and Bagley. The court held: (1) that CUI was obligated to indemnify UMass for amounts paid to satisfy the Irvine judgment; (2) that to the extent CNA had already indemnified UMass for Irvine, CNA was entitled to reimbursement from CUI; and (3) that neither CNA nor CUI was obligated to indemnify UMass for the amounts paid to settle the Bagley claims. UMass appeals from the judgment as regards the Bagley claim and CUI appeals from the judgment as to the Irvine claim; the appeals have been consolidated.

[*372] I. PROCEEDINGS IN DISTRICT COURT

Janice Irvine was employed as a staff supervisor and coordinator [**3] at the UMass Health Education Center ("HEC"), part of the Health Education and Information Program ("HEIP"). Dr. James Hoopes was the head of HEIP and Ms. Irvine's boss. According to the allegations of her complaint, Irvine obtained information that Hoopes had sexually harassed female work-study students under his supervision. After she reported Hoopes' conduct, Irvine's position was eliminated and she was transferred to the University Counseling Center under the supervision of John Robinson. Robinson allegedly threatened to fire her if she "got out of line" and, calling her a "troublemaker," issued instructions that she be assigned to undesirable work and night hours. Eight months later, after being transferred from one unproductive position to another, Irvine's employment at UMass was terminated.

Irvine brought an action against the University and several of its administrators, including Robinson, raising numerous federal and state claims. She alleged that the employment decisions were made in retaliation for her reporting Hoopes' sexual harassment of his students. Following a jury trial, Irvine prevailed against Robinson on her federal civil rights claim. The jury found that Robinson [**4] took impermissible "adverse employment action" against her. Irvine was awarded $ 100,000 in compensation for pain and suffering and $ 6,100 for medical expenses. She was later awarded $ 69,596.55 for attorney's fees and expert witness fees. In a subsequent settlement agreement between CNA, UMass, Irvine and Robinson, CNA agreed to pay Irvine $ 101,235 plus interest at 8.5% from November 1, 1986, to February 1, 1987, and Robinson his attorney's fees in the amount of $ 4,865. CNA also obtained the right to seek indemnification from CUI.

The Bagley plaintiffs were eight work-study students who alleged they were sexually harassed by Dr. Hoopes. They brought suit against Hoopes, the University and various university officials, claiming multiple federal and state constitutional, statutory and common law violations. They alleged, inter alia, sexual harassment, discrimination, deprivation of due process, infliction of emotional distress, and assault and battery. The University defendants were alleged to have taken retaliatory action against the Bagley plaintiffs for registering their complaints against Hoopes. On motions to dismiss, the trial court dismissed certain of the claims [**5] against the defendants n1 and let stand the following claims: as against the University, claims under Title VII and Title IX; as against the University administrators, claims under 42 U.S.C. @ 1983 and Title VII insofar as injunctive and declaratory relief were sought; and as to the University individuals, claims under @@ 1983 and 1985, under Mass. Gen. Laws ch. 151B, @ 4(4) and ch. 12, @ 11(H, I), and for intentional infliction of emotional distress. Prior to trial, the Bagley case was settled by UMass for $ 225,000 "in full satisfaction of said plaintiffs' claims for damages, costs, and attorneys' fees." Both insurance companies disclaimed coverage of the Irvine judgment and the Bagley settlement.

- - - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - - -

n1 The trial court distinguished among the defendants in the following manner: "(a) the University; (b) university administrators President Knapp, the Trustees, and defendants Corrigan [Chancellor], Stockton [Director of Health Services] and Tubbs [Vice Chancellor of Student Affairs] in their official capacities ('the administrators'); and (c) university individuals -- defendants Corrigan, Stockton, Tubbs, Desmond [Tubbs' assistant], Robinson and Soler [Health Education Center supervisor] -- in their individual capacities."

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - -

[**6]

CNA had issued to UMass a "board of education liability" policy that included the University, University employees and members of the Board of Trustees as insureds. The policy provided coverage for loss from a "Wrongful Act," defined as

> any actual or alleged errors or misstatement or misleading statement or act or omission or neglect or breach of duty by the Assureds in the discharge of their duties, individually or collectively, or any matter claimed against them solely [illegible] [*373] reason of their being or having been Assureds during this policy period.

Among the exclusions in the CNA policy was an exclusion for other insurance: "The Insurer shall not be liable to make any payment for loss in connection with any claim against the Assureds . . . which is insured by another valid policy or policies . . . ."

CUI's policy with UMass was for "general liability insurance" and included as insureds "employees, agents, or other persons while acting for or on behalf of the University of Massachusetts . . . ." The policy stated that it afforded "primary insurance," subject to certain exceptions. Coverage A of the policy insured against liability for bodily injury caused by an "occurrence," defined [**7] as "an accident . . . which results in bodily injury . . . neither expected nor intended from the standpoint of the insured." Under Coverage P, "Personal Injury Liability," UMass was insured for certain intentional acts:

> Group A - false arrest, detention or imprisonment, or malicious prosecution;
> Group B - the publication or utterance of a libel or slander or of other defamatory or disparaging material, or a publication or utterance in violation of an individual's right of privacy . . . ;
> Group C - wrongful entry or eviction, or other invasion of the right of private occupancy[.]

[illegible] a general amendatory endorsement, Coverage P was amended to include:

> Group D - Bodily Injury, Sickness, Disease, Disability, Shock, Mental Anguish, Mental Injury and Humiliation.

Group E - Injury arising out of assault or battery by the Campus Police for th protection of persons or property.

The district court held that the CUI policy covered the Irvine claim that a UMass employee took adverse employment action against Irvine in retaliation for her reporting another employee's alleged sexual harassment of work-study students. Although the court determined that the acts of employment discrimination [**8] were not "occurrences" within the Coverage A policy definition, it held that there was coverage pursuant to the Coverage P section of the CUI policy providing coverage for "Bodily Injury, Sickness, Disease, Disability, Shock, Mental Anguish, Mental Injury, and Humiliation." The court also found that UMass had not breached the cooperation clause of the CUI policy and that CNA was relieved of any obligation to UMass due to the "other insurance" exclusion in the CNA policy.

With respect to the Bagley settlement, the district court held that UMass had failed to meet its burden of showing which of the settled claims, if any, were covered under either the CNA or CUI policy. Accordingly, the court ruled that neither insurer was obligated to indemnify UMass for the amounts the University had paid to settle Bagley.

II. DISCUSSION

Our review of the district court's disposition of the motions for summary judgment is plenary, Griggs-Ryan v. Smith, 904 F.2d 112, 115 (1st Cir. 1990), and requires us to determine whether "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter o law." Fed. R. Civ. P. 56(c). Upon motion, summary [**9] judgment is "mandate[d] . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). It is not for the court on summary judgment to weigh the evidence "but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). In making this determination we view the record in the light most favorable to the party opposing the motion, accepting all reasonable inferences favoring that party. Garside v. Osco Drug, Inc., 895 F.2d 46, 48 (1st Cir. 1990). This standard applies even where, as here, the district court is faced with summary judgment motions from all parties. Griggs-Ryan, 904 F.2d at 115.

[*374] The Irvine Claim

CUI contends that the district court, in finding coverage in Coverage P, Group D of CUI's policy, erred in holding CUI liable to reimburse CNA - and to indemnify UMass - for the award of damages in the underlying Irvine action. According to CUI, Coverage P does not cover the loss at issue. CUI claims that the amendatory [**10] endorsement adding Group D to Coverage P is ambiguous, and the ambiguity, argues CUI, must be construed in favor of the insurer.

"Where the facts upon which liability is claimed or denied under an insura policy are undisputed and the existence or amount of liability depends solely upon a construction of the policy, the question presented is one of law for court to decide." Atlas Pallet, Inc. v. Gallagher, 725 F.2d 131, 134 (1st Cir. 1984) (citing Edmonds v. United States, 642 F.2d 877, 881 (1st Cir. 1981)); accord Cody v. Connecticut Gen. Life Ins. Co., 387 Mass. 142, 439 N.E.2d 234, 237 (1982). In interpreting policy language, the court must give to it its ordinary meaning and "construe[] [it] in the sense that the insured will reasonably understand to be the scope of his coverage. " Slater v. U.S. Fidelity and Guaranty Co., 379 Mass. 801, 400 N.E.2d 1256, 1258 (1980).

" Coverage P - Personal Injury Liability" in its original form provided coverage for loss in connection with personal injury liability resulting from three separate offense Groups, A, B, and C. n2 In the pertinent part of an amendatory endorsement, n3 the following language was added:

Part 1 " Coverage P - Personal [**11] Injury" is amended to include:

(1) Group D - Bodily Injury, Sickness, Disease, Disability, Shock, Mental Anguish, Mental Injury, and Humiliation.

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n2 In pertinent part, coverage is provided for:
Group A - false arrest . . . ;
Group B - . . . libel or slander . . . ;
Group C - wrongful entry or eviction . . . [.]

n3 The endorsement also added "Group E - Injury arising out of assault and tery by the Campus Police for the protection of persons or property" and deleted the exclusion for personal injury resulting from an offense related to employment of the injured person by the insured.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

We agree with the district court that the class of injuries listed in Group D of the policy endorsement plainly covers the damage award to Irvine for the mental and emotional injury she suffered due to the actions of a UMass employee. Nothing on the face of the amendatory endorsement to Coverage P indicates that the Group D language did not mean precisely what it said, i.e., that the policy would provide coverage for liability [**12] resulting in bodily injury, sickness, disease, disability, shock, mental anguish, mental injury and humiliation.

CUI argues to the contrary, that the language of Group D does not mean what it literally says and that it is thus ambiguous. In its view, Group D does not stand alone but rather represents a modification to the type of injuries that may result from the enumerated offenses found in Groups A, B, and C and new Group E in the endorsement.

"Ambiguity is not created simply because a controversy exists between parties, each favoring an interpretation contrary to the other's." Jefferson Ins. Co. v. Holyoke, 23 Mass. App. Ct. 472, 503 N.E.2d 474, 476 (1987). CUI asks we ignore the plain language that it negotiated and agreed to include in policy and instead ascribe to that language a meaning that does not appear. If CUI had intended the interpretation of Group D that it now advances, it could and should have written it that way. "[It] did not do so, and we cannot distort the plain policy language to give it that construction." Save-Mor Supermarkets, Inc. v. Skelly Detective Service, Inc., 359 Mass. 221, 268 N.E.2d 666, 670 (1971). n4

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n4 In addition to seeking a ruling that the language is ambiguous, CUI contends that it is entitled to relief from the general rule that ambiguous policy provisions are to be construed against the insurer who drafted them, see, e.g., Liberty Mutual Ins. Co. v. Tabor, 407 Mass. 354, 553 N.E.2d 909, 914 (1990). It bases its argument on the claim that UMass was a "sophisticated insured" that actively participated in procuring the policy. Although we recently accepted a similar argument in Falmouth National Bank v. Ticor Title Ins. Co., 920 F. 2d 1058 (1st Cir. December 12, 1990), that case involved an insured that had negotiated specific terms tailored to govern the outcome of a particular lawsuit. Id. at 1060-61. No such particularized drafting participation by UMass appears in the record here. Moreover, because we have not found ambiguity in the policy in the first instance, we need not address the relative sophistication of UMass as an insured. We have reviewed the materials proffered by CUI in that regard, however, and conclude that the facts do not support a finding of equal bargaining power between CUI and UMass.

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[**13]

A [*375] policy provision that is unambiguous "must be given its pro effect." Mutual Fire, Marine & Inland Ins. Co. v. Costa, 789 F.2d 83, 87 (1st Cir. 1986). The language in Group D is clear: damages arising from the injuries there listed, when caused by the insured, are covered by the policy. The damages awarded in the underlying Irvine action were for pain and suffering for mental and emotional injuries caused by a UMass employee. Falling squarely within the Group D list of covered injuries, the Irvine damages were covered by the CUI policy. n5

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n5 We note that recently, in Titan Holdings Syndicate, Inc. v. Keene, 898 F.2d 265, 270 (1st Cir. 1990), we recognized that liability insurance policies generally provide coverage based on offenses rather than on the types of injuries sustained. The policies at issue in Titan Holdings contained endorsements similar to CUI's Group D, listing new injuries to be included under "personal injury." Because the insured did not mention or base an argument on the endorsements, however, we expressly declined to address their possible applicability, but noted:

> These endorsements, by adding "mental injury, anguish or shock" and "humiliation" to the definition of "personal injury" seem to expand the scope of coverage for personal injury to include claims against the insured based upon the type of injury suffered, rather than just claims for injuries arising from specifically enumerated offenses.

Id. at 271 n.6 (emphasis original).

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[**14]

CUI claimed in the district court that UMass had breached the cooperation clause of the policy and was therefore not entitled to reimbursement from CUI for the costs of defending the Irvine action. The district court rejected the claim. In the section of its brief to this court on Irvine, CUI merely mentioned that it sought review of the district court's ruling on this matter; the issue of noncooperation was not briefed. Because of "the settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived[,]" United States v. Zannino, 895 F.2d 1, 17 (1st Cir.), cert. denied, 108 L. Ed. 2d 944, 110 S. Ct. 1814 (1990), we do not consider the issue of noncooperation.

Having determined that the CUI policy provided coverage for the Irvine judgment, we consider what coverage, if any, was provided by UMass' policy with CNA. The CNA policy includes, in pertinent part, the following "other insurance" clause limiting its liability: "The insurer shall not be liable to make any payment for loss in connection with any claim against the Assured: (1) which is insured by another valid policy or policies . . . ."

The rule in [**15] Massachusetts with respect to "other insurance" provisions is that courts will effectuate the language of the policies. Mission Insurance Co. v. U.S. Fire Ins. Co., 401 Mass. 492, 517 N.E.2d 463, 466 (1988). The CNA "other insurance" clause is an "escape clause," which operates to deny coverage if there is other available insurance. Id. 517 N. E. 2d at 465 n. 3. The CUI policy does not contain a similar provision. Rather, CUI's "other insurance" clause, Condition 6, states that the policy provides "primary insurance" unless expressly stated "to apply in excess of or contingent upon the absence of other insurance." Condition 6 further states, "When this insurance is primary and the insured has other insurance which is stated to be applicable to the loss on an excess or contingent basis, the amount of the company's liability under this policy shall not be reduced by the existence of such other insurance."

There is no express statement in CUI's Coverage P, personal injury coverage, that the insurance is excess or contingent on the absence of other insurance. It is therefore primary insurance with respect to the Irvine claim. The effect of CNA's escape [*376] clause is to render CNA's coverage contingent [**16] on the absence of other insurance. Because the CUI insurance is primary and CNA's insurance is contingent, the plain language of CUI's Condition 6 affords complete coverage for the Irvine claim, as the district court ruled.

The Bagley Claim

With respect to the settlement reached between UMass and the Bagley plaintiffs, the district court granted summary judgment in favor of both insurance companies and against the University, holding neither company liable to indemnify UMass. The court ruled that UMass had failed to meet its burden to prove that the claims underlying the settlement were covered by either policy and to allocate the settlement amount between covered and uncovered claims.

"If the insurer denies coverage for all or part of a settlement, the insured should have the burden of proving the compromise of claims that were covered by the general insuring clause . . . ." A. Windt, Insurance Claims and Disputes @ 6.29 at 351 (2d ed. 1988). The insured's burden to allocate arises only after it has been demonstrated that a portion of the verdict or settlement is covered by the policy or policies and a portion is not. See American Home Assur. Co. v. Libbey-Owens-Ford [**17] Co., 786 F.2d 22, 30-31 (1st Cir. 1986) (court first determined only one claim covered by policy, then determined what portion of settlement amount attributable to covered claim); Duke v. Hoch, 468 F.2d 973, 976 (5th Cir. 1972) ("Obviously, the troublesome problem of separating out of the unallocated verdict the precise damages for which [the insurer] was responsible would be reached only if it was first established that a portion of the verdict represented liability for noncovered acts.").

UMass claims that all of the Bagley settlement was within CNA's coverage for wrongful acts. It argues alternatively that, should this court uphold the district court's determination of coverage under the CUI policy for the Irvine judgment, the CUI policy provides coverage as well for the substantially similar damages in Bagley. As with Irvine, the construction of the policy language to determine coverage is a question of law. Cody, 439 N.E.2d at 237.

UMass argues that the district court erred in stating that the University presented nothing "other than the settlement agreement to help determine whether, and to what extent, covered claims were the basis of settlement." [**18] Strictly speaking, the University is correct, for it had in fact also presented the following: the district court's Memorandum and Order on the motions to dismiss in Bagley ("Bagley Memorandum"), outlining which of the Bagley claims survived and as to which defendants; an affidavit stating that the Bagley Memorandum had provided the basis for the settlement of the Bagley claims; and an affidavit by UMass Treasurer Robert Brand listing the individual amounts paid in settlement ("Brand affidavit"). Our review of the pertinent material below leads us to conclude, although upon an analysis different from that of the district court, that UMass' motion for summary judgment on the Bagley settlement claim was properly denied. We also find, however, that the district court erred in granting summary judgment for CNA and CUI on the Bagley settlement claim.

The settlement agreement was made between the eight Bagley plaintiffs and the following defendants: the University; Victoria Soler; David C. Knapp; Robert Corrigan; David Stockton; Levester Tubbs; and the University Board of Trustees. Knapp and the trustees had been sued as University administrators; Corrigan, Stockton [**19] and Tubbs had been sued as administrators and individuals; and Soler only as an individual. n6 The University and the other defendants agreed to pay to the plaintiffs $ 225,000, which included damages, costs and attorney's fees. They also agreed to remove from the plaintiffs' University records any performance evaluations written by Soler and to document their removal, [*377] and to provide, if requested by two named plaintiffs, explanatory addenda to their academic transcripts. The Brand affidavit states that nine checks totaling $ 225,000, drawn on University funds, were issued to the eight plaintiffs and their attorneys. It lists the nine separate amounts n7 but does not indicate to whom each check was made out.

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n6 Soler was employed by the University as the Health Education Center supervisor. See n.1, ante, for a full list of the positions held by all of the individual defendants.

n7 The nine checks were for the following amounts: $ 89,000; $ 21,000; $ 10,000; $ 21,000; $ 10,000; $ 10,000; $ 15,000; $ 21,000; and $ 28,000.

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[**20] In the Bagley Memorandum, upon which the settlement was based, the district court had allowed the following three sets of claims to go forward: Title VII and Title IX, as to the University; 42 U.S.C. @ 1983 and Title VII for injunctive and declaratory relief, as to the University administrators (Knapp, Corrigan, Stockton and Tubbs); and, as to the individuals (Corrigan, Stockton, Tubbs, Desmond, Robinson and Soler), claims based on 42 U.S.C. @@ 1983 and 1985, state statutory provisions prohibiting retaliation in employment for opposing gender discrimination and prohibiting interference with federal or state rights by intimidation, and intentional infliction of emotional distress. Only the third set of claims could generate damages.

The University's argument that it met its burden of proving coverage for the entire settlement is based on its position that all of the settled Bagley claims are covered by the policies. It fails to recognize, however, that the settlement amount entailed not only compensatory damages but fees for the intiffs' attorneys. We turn first to the issue of damages.

As with the damages awarded in Irvine, CNA's "other insurance" exclusion [**21] operates to relieve CNA of liability for what otherwise would be its coverage for wrongful acts if CUI's Group D of Coverage P covers the damages claim. The Bagley demand letter preceding the settlement stated that the plaintiffs sought damages for emotional distress and related medical expenses; the settlement agreement stated only that the damages did not cover lost income. Because the damages thus resulted from injuries listed in Group D, CUI's policy provides coverage if the individual University defendants are covered as insureds. CUI claims that because its "named insured" endorsement only covers "employees . . . or other persons while acting for or on behalf of the University" the individuals are not covered. There is no dispute that the complained of retaliatory actions by Soler, Corrigan, Stockton and Tubbs occurred at the University and were committed by the defendants in their capacity as University employees. Construing the above-quoted policy language in its usual and ordinary sense, see Barnstable County Mut. Fire Ins. Co. v. Lally, 374 Mass. 602, 373 N.E.2d 966, 968 (1978), we conclude that the University individuals were covered by the CUI policy. CUI is therefore liable [**22] for that portion of the settlement that represents damages.

As for the settlement amount paid as fees, nothing submitted by UMass indicates which one of the nine listed checks went to the attorneys. Furthermore, knowing the amount of the settlement attributable to fees is not enough. Whether or not the fees are covered by one insurance policy or the her, n8 or neither, depends on determining which claims entitled the intiffs to fees and as to which claims the fees were actually attributable.

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n8 The CNA policy covers attorney's fees. The CUI policy does not appear to cover fees, CUI has stated that it does not, and UMass does not point to any CUI provision that would cover attorney's fees.

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Attorney's fees were permitted for the Title VII and Title IX claims against the University. See 42 U.S.C. @ 2000e-5(k); 42 U.S.C. @ 1988. Although no damages were payable for these claims, the settlement did provide for injunctive relief by the University. It is therefore possible that some of the fees were attributable in [**23] fact to work performed by the plaintiffs' attorneys relative to these claims. Attorney's fees were also allowable for the Title VII and @ 1983 claims for injunctive relief against the UMass administrators, and some of the fees may have compensated the attorneys [*378] for work associated with these claims. With respect to the remaining claims against the individual defendants for damages under federal and state statutes and intentional infliction of emotional distress, at least some of these claims entitle prevailing plaintiffs to recover attorney's fees. See, e.g., 42 U.S.C. @ 1988 (providing fees for @@ 1983 and 1985 violations); Mass. Gen. Laws ch. 12, @ 11 (I) (fees for violation of statute). A portion of the fees paid in settlement may have been attributable to these claims.

CUI's policy, although it covers the damages, does not provide coverage for plaintiffs' attorney's fees. To the extent, therefore, that the fees portion of the settlement amount relates to attorney work performed in connection with the claims for damages, CUI is not liable.

The CNA policy covers wrongful acts and attorney's fees as against all the defendants. Under the CNA policy, where there is "other insurance" [**24] for a claim CNA "shall not be liable to make any payment for loss in connection with" such claim. CNA, therefore, is only responsible for attorney's fees generated in connection with wrongful acts covered by its own policy, and is therefore not liable for the attorney's fees attributable to the damage claims covered by the CUI policy. The same is true for the claims for injunctive relief against the University administrators, who are covered by the CUI policy which does not provide for fees. With respect to the Title VII and Title IX claims against the University itself, however, there is no "other insurance" relative to CNA, as CUI does not insure the University as an entity, only its "trustees . . ., officers, directors, . . . faculty members, employees, agents, or other persons while acting for or on behalf of the University of Massachusetts . . . ." Fees associated with the claims for injunctive relief against the University entity are therefore within the coverage of the CNA policy.

To summarize, the evidence shows the following with respect to the Bagley settlement: CUI is liable to indemnify UMass for that portion of the settlement paid as damages; CNA is liable for that [**25] portion of the settlement representing attorney's fees attributable to the Title VII and Title IX claims against the University.

What the evidence does not show, however, is what portion of the settlemen represents damages, what portion attorney's fees, and what portions of the fees are attributable in fact to which underlying claims for relief. In short, as the district court held, UMass failed to show the factual basis for the settlement. "[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion . . . ." Celotex Corp., 477 U.S. at 323. The University's motion for summary judgment was properly denied.

The district court granted summary judgment in favor of CNA and CUI against UMass because UMass had failed to prove the allocation of covered and noncovered claims after CNA raised the allocation issue in its motion. Parties moving for summary judgment are entitled to judgment as a matter of law if "the nonmoving party has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof." Celotex Corp., 477 U.S. at 323. Only if there is no [**26] genuine issue of material fact are the insurers entitled to summary judgment. "The question is not whether there is literally no evidence favoring the non-movant, but whether there is any upon which a jury could properly proceed to find a verdict in that party's favor." De Arteaga v. Pall Ultrafine Filtration Corp., 862 F.2d 940, 941 (1st Cir. 1988) (emphasis original).

The determination of how much of the settlement payment was for damages and how much was for attorney's fees is a question of material fact. As discussed ante, all of the sums paid to the Bagley plaintiffs as damages are covered by the CUI policy. Some of the attorney's fees might be covered by the CNA policy. This cannot be determined without specific findings on how the attorney's fees were computed.

[*379] Despite the lack of specification by UMass at the summary judgment stage of the proceedings, we cannot say, as did the district court, that CNA and CUI were entitled as a matter of law to judgment in their favor. After all, this is a declaratory judgment action in which coverage of the respective policies is the main issue.

CNA argues that it would be unfair to allow UMass to allocate the amounts after the [**27] coverage issue is decided. According to CNA, once it has been determined which policy covers which claims, an insured would naturally tend to tailor its proof of what amount was paid in settlement to whom and for what accordingly. This fear is unwarranted in this case. Where the damages have been held to be covered by CUI's policy only, the only remaining factual question is the total amount of the settlement paid as damages. With regard to the fees paid to the Bagley plaintiffs' attorneys, the apportionment based on work performed among the various legal claims is within the control of the plaintiffs' attorneys, not UMass. As we have previously held,

> Despite the problems that are inherent in any post facto analysis of settlement claims, if the district court is to make an allocation of the settlement amount, it should accept whatever evidence is available regarding the intent behind the settlement decision. If the court finds that there is a material issue of fact as to how the settlement amount was allocated, that finding should be made at trial and not on summary judgment.

American Home Assur. Co., 786 F.2d at 31.

In its motion for summary judgment and its brief to [**28] this court, CUI raises an issue concerning the University's breach of its duty under the policy to cooperate with CUI in the defense of the Bagley litigation.

According to CUI, the breach relieves the company of any liability to indemnify UMass. CUI's motion refers to an affidavit in support of its factual averments, which, for some reason, is not part of the record on appeal. Because such a claim is fact-sensitive, we believe that the district court ought to rule on it in the first instance on remand. See Diamond International Corp. v. Allstate Ins. Co., 712 F.2d 1498, 1504 (1st Cir. 1983) (status of employee under insurance policy fact-sensitive and thus not decided on appeal).

Because we remand for further proceedings that may result in no coverage by the CNA policy, we do not address CNA's other arguments.

III. CONCLUSION

We uphold the summary judgment for CNA on the Irvine judgment, affirm the denial of summary judgment for UMass on the Bagley settlement, and reverse the summary judgment for CNA and CUI on the Bagley settlement. On remand the court shall determine the total amount of the settlement paid as damages and enter judgment against CUI in that [**29] amount. As to the remainder of the settlement, which is attorney's fees, the court shall apportion the amount among the various surviving underlying Bagley claims. To the extent it may be determined that a portion of the fees represents compensation for work performed in connection with the Title VII and Title IX claims against the University, the court shall enter judgment against CNA in that amount. The burden shall be on UMass to produce the evidence necessary for these determinations. In addition, UMass claims it is entitled to $ 51,210.27 in defense costs incurred in Bagley. This is also a matter for the trial court to determine based on evidence presented by UMass, apportioned in the same manner as the attorney's fees.

Affirmed in part, reversed in part, and remanded for further proceedings in accord herewith. No costs to any party.

23RD CASE of Level 3 printed in FULL format.

ANDOVER NEWTON THEOLOGICAL SCHOOL, INC., Plaintiff,
Appellant, v. CONTINENTAL CASUALTY COMPANY, Defendant,
Appellee. ANDOVER NEWTON THEOLOGICAL SCHOOL, INC.,
Plaintiff, Appellee, v. CONTINENTAL CASUALTY COMPANY,
Defendant, Appellant

Nos. 89-1945, 89-1946

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

930 F.2d 89; 1991 U.S. App. LEXIS 5855; 55 Fair Empl. Prac.
Cas. (BNA) 977; 56 Empl. Prac. Dec. (CCH) P40,705

April 10, 1991

PRIOR HISTORY: [**1]

Cross-Appeals from the United States District Court for the District of Massachusetts; Hon. Joseph L. Tauro, U.S. District Judge.

DISPOSITION: Reversed in Part, Affirmed in Part, and Remanded for Further Action in Accordance with this Opinion. Costs to Appellant.

COUNSEL: Leonard F. Clarkin with whom Harry C. Beach, Wood, Clarkin & Sawyer, P.C., Susan A. Jackson and Haussermann, Davison & Shattuck were on brief for [illegible]over Newton Theological School, Inc.

Patricia A. Gotschalk with whom Timothy C. Russell, S. Elizabeth Doran, Drinker, Biddle & Reath, Joan M. Griffin and Casner & Edwards were on brief for Continental Casualty Company.

JUDGES: Campbell, Chief Judge, Coffin, Senior Circuit Judge, and Cyr, Circuit Judge.

OPINIONBY: COFFIN

OPINION: [*90] COFFIN, Senior Circuit Judge

In 1987, a jury found that Andover Newton Theological School, Inc. (Andover) both violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. @@ 621-634, and breached an employment contract when it terminated a tenured professor. This court affirmed the jury's verdict in Linn v. Andover Newton Theological School, Inc., 874 F.2d 1 (1st Cir. 1989). Andover thereafter made a claim on its insurance [**2] carrier, Continental Casualty Co. (Continental). When Continental refused to pay the claim, Andover filed suit, alleging breach of insurance contract and unfair and deceptive trade practices. The district court held that Continental was not obligated under the policy to reimburse Andover [*91] for damages arising from the Linn case because Massachusetts law precluded an insurance company from insuring a willful violation of the ADEA. See Mass. Gen. L. ch. 175, @ 47, Sixth (b). The court [illegible]o held that the policy language unambiguously excluded payments for amounts [illegible] under the terms of a contractual obligation. The court held, however, that the policy permitted recovery of costs associated with the defense of the Linn case, and awarded $ 102,748.85 for that loss.

On appeal, Andover challenges both the district court's determination that willful violation of the ADEA fell within the public policy proscriptions of Mass. Gen. L. ch. 175, @ 47, Sixth (b), and the court's interpretation of the policy exclusion for contractual obligations. Continental, in turn, appeals the award of litigation costs.

After hearing oral argument, this court concluded that a critical issue in this [**3] case turned on a question of Massachusetts law on which we could find no controlling precedent. We therefore certified a single question to the Massachusetts Supreme Judicial Court in accordance with Mass. S.J.C. Rule 1:03:

> Does a finding of willfulness under the Age Discrimination in Employment Act (ADEA), if based on a finding of "reckless disregard as to whether [defendant's] conduct is prohibited by federal law," constitute "deliberate or intentional . . . wrongdoing" such as to preclude indemnification by an insurer under the public policy of Massachusetts as codified at Mass. Gen. L. ch. 175, @ 47 Sixth (b)?

Andover Newton Theological School, Inc. v. Continental Casualty Co., 901 F.2d 1, 3 (1st Cir. 1990). The SJC answered that it did not. Andover Newton Theological School, Inc. v. Continental Casualty Co., 409 Mass. 350, 566 N.E.2d 1117 (1991). With that answer in hand, we now address the parties' contentions on appeal. Concluding that the district court erred, we reverse and remand the case for further proceedings consistent with this opinion.

I. The ADEA Claim

Andover was insured by Continental for losses arising out of [**4] wrongful acts. The scope of the insured loss specifically was limited by policy language stating that:

> such subject of loss shall not include . . . matters which shall be deemed uninsurable under the law pursuant to which this policy shall be construed.

In the underlying action, Andover was found by a jury to have violated the ADEA by discharging Dr. Edmund Linn from his tenured faculty position when he was 62 years of age. The jury also found Andover's conduct to have been willful under the ADEA. The jury's finding of willfulness was based on an instruction that "[a] defendant acts willfully if it knows its conduct was prohibited by federal law or if it acts in reckless disregard as to whether its conduct is prohibited by federal law. 'Prohibited' being age discrimination in this case."

The district court granted summary judgment to Continental, holding that the United States Supreme Court had defined "willful" under the ADEA to mean "voluntary," "deliberate" or "intentional" in McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133 , 100 L. Ed. 2d 115 , 108 S. Ct. 1677 (1988). The court then concluded that "willful" conduct was within the meaning of the Massachusetts provision precluding insurance [**5] coverage for "deliberate or intentional . . . wrongdoing."

The district court's reliance on this language from McLaughlin was misplaced. First, the controlling definition by the Supreme Court of the word "willful" the liquidated damages provision of the ADEA, 29 U.S.C. @ 626(b), appears in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 128 , 83 L. Ed. 2d 523 , 105 S. Ct. 613 (1985), where the Court held that "a violation is 'willful' if the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.'" Second, the language from McLaughlin quoted by the district court was preliminary discussion; the McLaughlin Court ultimately adopted the Thurston standard. Finally, regardless of [*92] the standard enunciated by the Supreme Court, what is significant here is the standard actually applied by the jury in reaching its finding of willfulness -- knowing or reckless disregard of whether conduct is proscribed by federal law. And, answering our certified question, the SJC has held that an action taken in reckless disregard of the ADEA is not conduct uninsurable under Massachusetts law. It would seem, therefore, that Continental [**6] is obligated under the policy to reimburse Andover for the loss if the jury's finding of willfulness rested on a finding of recklessness.

Continental, however, advances one further reason why Andover's conduct falls within the Massachusetts statute's proscription. It argues that, in an individual disparate treatment case, a finding of liability constitutes a finding of intentional discrimination. See, e.g., Menzel v. Western Auto Supply Co., 848 F.2d 327, 329 (1st Cir. 1988) ("finding of pretext is the equivalent of a finding that the employer intentionally discriminated"). Therefore, Continental suggests, once the jury found liability, coverage was illegal under the Massachusetts statute, and the finding of willfulness was unnecessary.

Continental relies for this argument on cases from other circuits adopting a standard of willfulness higher than the Thurston standard in actions alleging individual disparate treatment because, in such cases, a finding of liability requires a finding of intentional discrimination, and therefore willfulness will almost always be present. n1 Those courts concluded that a more stringent willfulness standard must be applied [**7] in such cases to respond to the Thurston Court's understanding that "willfulness" was not intended to be interpreted so as to result in double damages in almost every case. See Thurston, 469 U.S. at 128. But these cases do not state that every finding of liability in an individual disparate treatment case necessarily requires a finding of willfulness under the Thurston standard. n2 More importantly, these cases do not even come close to suggesting that the standard for liability in individual disparate treatment cases is higher than the Thurston standard for willfulness -- in other words, that a finding of discrimination precludes the employer's conduct from being merely reckless with regard to the Act -- as defendant argues here.

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n1 See Schrand v. Federal Pacific Elec. Co., 851 F.2d 152, 158 (6th Cir. 1988); Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1549 (10th Cir. 1988); Dreyer v. Arco Chemical Co., 801 F.2d 651, 658 (3d Cir. 1986).

n2 See also Burlew v. Eaton Corp., 869 F.2d 1063, 1069 (7th Cir. 1989) (finding of intentional discrimination does not necessarily indicate a "conscious, deliberate state of mind"); Bethea v. Levi Strauss & Co., 827 F.2d 355, 359 (8th Cir. 1987) (applying Thurston standard, a finding of intentional discrimination does not require finding of willfulness); Gilliam v. Armtex, Inc., 820 F.2d 1387, 1390 (4th Cir. 1987) (admission of awareness of ADEA coupled with finding of violation does not require finding of willfulness). But cf. Lindsey v. American Cast Iron Pipe Co., 810 F.2d 1094, 1099 (11th Cir. 1987) (on facts of case, finding of discrimination together with admission of knowledge about ADEA required finding of liquidated damages under Thurston standard).

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[**8]

In addition, the SJC's opinion expressly rejects the defendant's loose understanding of the word "intentional." As the court says, "the fact that a wrongful act was committed intentionally . . . does not alone bar coverage. That bar arises only if an intentionally committed, wrongful act was also done deliberately or intentionally, in the sense that the actor knew that the act was wrongful." Andover Newton, 409 Mass. at 352, 566 N.E. 2d 1117. n3

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n3 In other words, Massachusetts law only proscribes coverage of acts committed with the specific intent to do something the law forbids. Cf. Loeb v. Textron, Inc., 600 F.2d 1003, 1020 n.27 (1st Cir. 1979) ("'An act is done "willfully" if done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.'") (quoting E. Devitt & C. Blackmar, Federal Jury Practice and Instructions @ 14.06, at 384 (3d ed. 1977)).

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[**9]

There is no indication in this case that the jury made a determination abou Andover's state of mind other than in its conclusion that Andover had acted willfully -- a finding that would bar recovery only if the jury based its determination on a conclusion [*93] that Andover knew its actions were wrongful. Instead, the jury was asked to determine whether "age was a motivating factor in [Linn's] discharge in the sense that but for defendant's motive to discriminate against him because of his age he would not have been discharged." And the judge specifically instructed the jury that Andover legally could not consider the availability of a pension to Linn or make assumptions about the productivity of older persons in deciding which faculty member to terminate. The jury could have found that Andover considered these factors -- and therefore discriminated -- without consciously appreciating the illegality of its act. See Burlew, 869 F.2d at 1066 ("'Age discrimination may simply arise from an unconscious application of stereotyped notions of ability rather than from a deliberate desire to remove older employees from the workforce. . . .'") (quoting Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 154-55 (7th Cir. 1981), [**10] overruled in part by Coston v. Plitt Theatres, Inc., 860 F.2d 834 (7th Cir. 1988) (emphasis in original)). There is simply nothing inherent in the finding of age discrimination or in the instructions given the jury here that rendered a finding of willfulness superfluous. n4

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n4 Indeed, as a factual matter, there is some evidence that the jury reach the willfulness question without finding conscious, intentional discrimination. During deliberations, the jury returned with a question abo willfulness:

Your Honor, we would like to see the exact wording of the age discrimination law, in particular the wording of the part that addresses willful or reckless disregard of the law.

More precisely, if it is unintentional, is it willful or reckless or can it be?

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We therefore conclude that Massachusetts public policy does not bar insurance coverage of an employment action solely because it is found to violate the ADEA in an individual disparate treatment case. Nor, according to the SJC, does a jury's determination [**11] that the violation was willful bar coverage, if the jury based that determination on a finding of recklessness. The district court therefore erred in granting summary judgment to Continental on this issue.

II. The Contract Claim

The insurance policy contained a clause excluding coverage for contract claims:

The Insurer shall not be liable to make any payment for loss in connection with any claim against the Assureds, and/or the School District.

.

(6) For any amounts due, under the terms of any contractual obligation . . . .

Andover argues that this exclusion is ambiguous. It suggests that the clause does not exclude coverage of damages incurred through discriminatory acts under the ADEA; the policy merely excludes coverage for monies owed on a contract. Thus, despite the fact that the clause would prevent recovery for awards of back pay, front pay and retirement benefits on the breach of contract claim, damages caused by discrimination that consist of back pay, front pay and retirement benefits should be recoverable. The district court, however, held that the term "contractual obligations" was unambiguous and that these damages were not recoverable by the clear meaning [**12] of the term.

Although clear provisions should not be strained to suggest ambiguity, see Mutual Fire, Marine and Inland Ins. Co. v. Costa, 789 F.2d 83, 87 (1st Cir. 1986), the wording of an exclusion must be strictly construed, and any ambiguity is to be interpreted in favor of the insured. See American Home Assur. Co. v. Libbey-Owens-Ford Co., 786 F.2d 22, 26 (1st Cir. 1986); Abernathy, 393 Mass. at 82, 469 N.E.2d at 799. We cannot conclude that the meaning of the instant exclusion is clear. The provision specifically states that Continental is not liable for a loss in connection with "any claim against the Assureds . . . for any amounts due, under the terms of any contractual obligation." The clause implies that only claims invoking the terms of the contract itself are excluded, not claims awarding damages for losses caused by a [*94] discriminatory act or amounts that would have been owed on a separately enforceable employment contract, had the discriminatory act not occurred. While this court has indicated that "in its 'essential nature' an ADEA action is identical to a common law suit for . . . breach of contract," [**13] see Kolb v.

Goldring, Inc., 694 F.2d 869, 871-72 (1st Cir. 1982), the ADEA itself does not create an overall employment contract. It creates a single legal obligation not to discharge for discriminatory reasons. The Kolb decision, on which Continental relies, decided only that, under the ADEA, damages were recoverable strictly for economic losses, not for pain and suffering; it did not intend to redefine "contractual obligation" as used by an insurer in a coverage provision.

In this case, the jury separately found that a contract was breached. But no employment contract need have existed for damages to have resulted from a violation of the ADEA. Andover would have been liable under the ADEA for damages caused by its discriminatory acts, including damages for back pay, front pay and retirement benefits, even if Linn were employed at will. Thus, the ADEA damages awarded did not depend on the existence of an underlying contract, but only on the existence of an ongoing employment relationship.

In reaching the opposite conclusion, the district court relied on National Union Fire Ins., Inc. v. Hospital Affiliates Management Corp., 363 N.W.2d 494, 496 (Minn. Ct. App. 1985). [**14] The court reasoned that the National Union case had interpreted the identical policy language and found it to be unambiguous; therefore the clause was unambiguous here. But the National Union court was dealing with an action for breach of contract only. That court said merely that the quoted language was not ambiguous insofar as it clearly precluded indemnification for unliquidated as well as liquidated damages caused by the breach. The court expressed no opinion on the existence of ambiguity in the factual situation presented here. To the contrary, the National Union court's analysis supports our own reasoning. It stated that unliquidated damages for lost profits and loss of goodwill were excluded because they were "element[s] of contract damages, meaning that liability for payment arises by virtue of the contractual obligation." Id. at 496 (emphasis our own). In this case, the liability for payment of ADEA damages did not "arise[] by virtue of the contractual obligation." It arose by virtue of a violation of federal law in an employment relationship that caused economic losses.

We conclude, therefore, that the meaning of the clause is ambiguous [**15] and construe the provision favorably to Andover. While Continental could have insured against recovery for wages in a discrimination action, it did not explicitly do so. If the discharge of Linn was taken in reckless disregard of federal law, Andover is entitled to reimbursement for damages caused by the violation of that law.

Having reached this conclusion, we note Continental's own uncertainty about the meaning of the provision, as expressed in its Corporate Claim Policy Manual. n5 There, the company advised claims examiners:

> Also, be conscious of the type of damages that could be assessed. Note exclusion IV (b)(6) in the liberalization endorsement. Specific awards for breach of contract are not covered; e.g., salary due for wrongful termination. However, if the award for salary is not as back pay, but rather damages that consist of back pay, there may be coverage.

[*95] (Emphasis in original.) If Continental, itself the drafter of the clause, was not sure whether the exclusion applied to damages consisting of back pay, we are even more certain that the clause cannot be treated as unambiguous. In these circumstances, an award of damages on the discrimination claim that

includes [**16] amounts representing back and front pay and retirement benefits is recoverable.

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n5 We are aware that where language is clear and unambiguous, extrinsic evidence is inadmissible to prove the parties' intent. See, e.g., Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co., 682 F.2d 12, 17 (1st Cir. 1982). Here, however, we already have concluded that the language is unclear. See Keating v. Stadium Management Corp., 24 Mass. App. Ct. 246, 249-50, 508 N.E.2d 121, 123 (1987) (may use extrinsic evidence to elucidate but not contradict the written terms). Moreover, we do not use this information to show what Continental actually intended the clause to mean, but rather to indicate that Continental itself saw the clause to be potentially ambiguous.

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III. Defense Litigation Costs

Continental argues that the district court erred in determining that it was liable under the policy to reimburse Andover for defense costs incurred in the Linn action. Continental asserted [**17] below that coverage for defense costs is limited to those situations in which there is underlying policy coverage for the act. The district court determined that, notwithstanding the fact that liability coverage was unavailable for willful discrimination under the ADEA, the policy failed to exclude coverage for defense costs associated with those claims. We agree.

The Continental policy covers losses the assured becomes legally obligated to pay, and "loss" is defined as:

> any amount which the Assureds are legally obligated to pay . . . for a claim or claims made against the Assureds for a Wrongful Act and shall include but not be limited to damages, judgments, settlements and costs, cost of investigation and defense of legal actions, (excluding from such costs of investigation and defense, salaries of officers or employees of the School District or any other governmental body) claims or proceedings and appeals therefrom, . . . provided always, however, such subject of loss shall not include . . . matters which shall be deemed uninsurable under the law pursuant to which this policy shall be construed.

Continental does not deny that discriminatory acts are "wrongful acts" within [**18] the meaning of the policy. Coverage for wrongful acts, however, is limited by a specific exclusion of those "subjects of loss" deemed uninsurable under Massachusetts law. The exclusion of defense costs therefore is dependent on whether Massachusetts would consider such costs uninsurable.

As we have discussed, Massachusetts law precludes an insurance company from insuring "any person against legal liability for causing injury, other than bodily injury, by his deliberate or intentional crime or wrongdoing." Mass. Gen. [illegible] ch. 175, @ 47, Sixth (b). As we read this language, while public policy proscribes insuring against legal liability for intentional wrongdoing, the language of the public policy prohibition expresses no intent with respect to insurance coverage for the costs of defending against such liability.

Although an argument can be made that a public policy is to some extent subverted by insurance against defense costs, the basic fact is that this is not insurance against liability. Continental points to no authority for extending the public policy bar to these claims. Where the SJC has declined to interpret the scope of the public policy provision expansively, see Andover Newton, 409 Mass. 350, 566 N.E.2d 1117 , [**19] we also are loath to do so.

As we have noted, exclusions must state clearly what items are to be excluded, see American Home Assur., 786 F.2d at 26. Continental, while it could have done so, made no attempt to exclude defense costs associated with uninsurable claims. The policy therefore allows such coverage. See Starkville Mun. Separate School Dist. v. Continental Casualty Co., 772 F.2d 168, 170 (5th Cir. 1985) ("While punitive damages themselves may be uninsurable for reasons of public policy, that same public policy does not apply to costs and attorney's fees incurred in a defense against a plea for punitive damages . . . . If CNA intended to exclude these other costs from the policy's coverage, it needed to do so more explicitly . . . ."). n6

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n6 Continental attempts to distinguish Starkville because the defense of the punitive damages claim in that case ultimately was successful, unlike in this case. But the Starkville court, while noting that this factor was an additional reason supporting coverage, did not rest its analysis on the distinction.

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[**20]

[*96] Continental, however, relies on an unpublished district court case, Continental Casualty Co. v. McAllen Indep. School Dist., No. B-86-007 (S.D. Tex. May 19, 1987), holding that with a reimbursement policy such as the one in this case, the reimbursement coverage obligation is limited to losses incurred with respect to " covered claims." But even were this decision of precedential value here, see Loc. R. App. P. 36.2 (citation to unpublished decisions limited to related cases), the case is inapposite. McAllen decided that the underlying acts did not fall within the scope of covered acts under the policy. It is therefore reasonable for reimbursement for defense costs to extend only as far as coverage for the acts. In this case, as we have observed, there is no dispute that the policy covers "wrongful acts" of the type that occurred here. It is only the scope of the exclusion that is at issue, and the exclusion language is narrow.

We therefore conclude that Continental is liable for defense costs incurred in the Linn action, regardless of whether the termination ultimately is found to

dispute [**21] that defense costs associated with the contract action are recoverable if the ADEA defense costs are covered. Andover therefore is entitled to reimbursement for its defense costs associated with all claims.

As Continental asserts, however, it appears that the district court award attorney's fees without receiving any evidence about the actual costs of defending the Linn action. The court awarded defense costs in the amount of attorney's fees recovered by Linn in the underlying action, apparently concluding that if the amount was the reasonable value of attorney's fees for

Linn, it is the reasonable amount spent by the school in the action. This analysis is not adequate. On remand, the district court should receive proof of the amounts actually expended by Andover and establish the amount of Continental's obligation accordingly.

Reversed in part, affirmed in part, and remanded for further action in accordance with this opinion. Costs to appellant.

8TH CASE of Level 2 printed in FULL format.

CITY OF WEST HAVEN v. HARTFORD INSURANCE COMPANY

No. 26 45 67

Superior Court of Connecticut, Judicial District of New Haven

41 Conn. Supp. 548; 594 A.2d 495; 1990 Conn. Super. LEXIS 915

August 14, 1990, Decided
August 14, 1990, Filed

NOTICE: [*1]

THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

JUDGES: Robert I. Berdon, Judge.

OPINIONBY: BERDON

OPINION: MEMORANDUM OF DECISION ON THE CROSS-MOTIONS FOR SUMMARY JUDGMENT

Before the court are the parties cross-motions for summary judgment on the first count of a multi-count complaint. n1 The first count is predicated on the claim of the plaintiff City of West Haven that the defendant Hartford Insurance Company breached its contract of insurance by not paying punitive damages of $ 60,000.00 awarded to Tracy McAneny in a federal district court case brought against two West Haven police officers, Joseph Innamorato and Joseph Conzo (hereinafter referred to as the "Police Officers") for violations of his civil rights. The facts as they pertain to the first count are not in dispute and the legal issues are ripe for summary determination. Catz v. Rubenstein, 201 Conn. 39, 48 (1986).

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n1 The remaining counts allege breach of duty of good faith and fair dealings, violation of Connecticut Unfair Insurance Practices Act and violation of Connecticut Unfair Trade Practices Act.

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[*2]

McAneny brought suit against the Police Officers in the United States District Court for Connecticut n2 seeking damages pursuant to 28 U.S.C. @ 1983 for violation of his civil rights which was predicated on the ground that they prepared and furnished a false affidavit to establish probable cause to support a warrant for his arrest (hereinafter referred to as the " Civil Rights Suit"). McAneny also alleged in the complaint of the Civil Rights Suit the following: "From their prior investigation, the . . . [Police Officers] knew that December 29 was . . . [McAneny's] birthday. On December 29, 1983, at approximately 2:30 p.m., the . . . [Police Officers] visited . . . [McAneny] at his . . . place of employment. As [McAneny] extended his hand to greet them . . . [one of the Police Officers] placed a handcuff upon . . . [McAneny's] wrist and stated: 'Happy Birthday, Sucker. You're under arrest.' [The Police Officers] . . . thereupon arrested . . . [McAneny based on the arrest warrant supported by the false affidavit]. . . . [The Police Officers] . . . thereupon transported . . . [McAneny] in handcuffs and in police custody to the headquarters of the West Haven Police Department [*3] and subjected him to routine booking procedures and thereafter required . . . [McAneny] to appear in the Connecticut Superior Court at West Haven on many occasions as an accused criminal." On June 20, 1984, approximately six months after the arrest, the criminal charges against McAneny were dismissed.

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n2 Tracey McAneny v. Joseph Innamorato, et al., U.S. District Court, D. of Conn., Civil No. N-84-548.

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The defendant furnished independent counsel to defend the Police Officers on the Civil Rights Suit under a reservation of rights. On June 11, 1987, after a trial, the jury found in favor of McAneny against both Police Officers, and awarded $ 30,000.00 in compensatory damages and $ 60,000.00 in punitive damages. The federal district court entered judgment on the verdict and awarded torney's fees pursuant to 42 U.S.C. @ 1988. The defendant Travelers surance Co. paid the compensatory damages of $ 30,000.00 and the attorney's fees, but refused to pay the punitive damages against the Police Officers. The award [*4] of the $ 60,000.00 was paid by the Plaintiff on behalf of the Police Officers and it seeks to recover this sum under the first count.

The motions were argued on the basis that the City of West Haven was the only insured under the contract of insurance. Accordingly, the court will treat the case as the parties have done. Lashgari v. Lashgari, 197 Conn. 189, 196 (1985). In order to establish liability, the plaintiff must prove the following two elements. First, the plaintiff must prove West Haven was liable to indemnify the Police Officers for the punitive damages the jury awarded against them. The contract of insurance entered into by the parties provides for the following: "The company [Hartford Insurance] will pay on behalf of the insured [City of West Haven] all sums which the insured shall become legally obligated to pay as damages. . . ." So if the City of West Haven was not obligated to indemnify the Police Officers, there would be no liability on the part of the defendant Hartford Insurance Company. Second, the contract of insurance must provide that the defendant is obligated to indemnify the plaintiff for the punitive damage award. The first element is dispositive [*5] of these motions since the court finds there was no obligation on the part of West Haven to idemnify the Police Officers for an award of punitive damages against them.

Under the common law, "the municipality would have been immune from liability for the tortious conduct of its police officers." Ahern v. New Haven, 190 Conn. 77, 82 (1983). Furthermore, a principal is ordinarily not liable for punitive ages awarded for acts of its agents in course of their employment. Maisenbacker v. Society Concordia, 71 Conn. 369, 379 (1899). Of course, there are exceptions such as when the principal expressly authorizes the act as it was performed which was the basis for the award of punitive damages. Id. 380;

Restatement (Second) Torts @ 909. Certainly, West Haven does not claim that it is responsible for the punitive damages because it authorized these Police Officers to act in the outrageous manner which led to the award. Even if West Haven was a named defendant in the Civil Rights Suit and the prerequisites for liability were found; Monell v. Department of Social Services, (City of New York), 436 U.S. 658, 690-91 (1978); it would have absolute immunity from liability [*6] for punitive damages under @ 1983. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981). Therefore, if West Haven is to be held liable for punitive damages, it must be found under a statutory basis. See Gionfridido v. Avis Rent A Car System, Inc., 192 Conn. 280 (1989). The plaintiff City of West Haven claims that the statutory basis for its liability to indemnify the Police Officers can be found in General Statutes @@ 7-101a and 7-465.

Before determining whether either statute would require indemnification on the part of West Haven, the court must first determine the nature of punitive damages awarded by the jury in the Civil Rights Suit in order to put it in its proper perspective. Violations of a person's civil rights by individual public officers under 42 U.S.C. @ 1983 allows for an award of compensatory and punitive damages; Carlson v. Green, 446 U.S. 14, 22 (1980); and attorney's fees; 42 U.S.C. @ 1988. Punitive damages may be awarded under @ 1983 "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." Smith v. Wade, 461 [*7] U.S. 30, 56 (1982). The federal district court (Burns, C. J.) in the Civil Rights Suit instructed the jury in determining whether they should award punitive damages in almost the identica language of Wade as follows: "Punitive damages are additional damages, beyond those awarded as compensatory, to be awarded to the plaintiff as a deterrent to the defendant to discourage him from committing the conduct complained of in the future. You may only award punitive damages if you find the defendant [Police Officers] acted with evil motive or intent, or with reckless and callous disregard of, or indifference to, the rights or safety of plaintiff [McAneny]. You have latitude in determining the amount of punitive damages to add to nominal or compensatory damages. You may add such amount as you shall unanimously agree is proper to punish defendants for extraordinary misconduct and to serve as an example or warning to others not to engage in such conduct. However, the amount must be fixed with calm discretion and sound reason, and not because of sympathy, bias, or prejudice against any party" (emphasis supplied).

The verdict form submitted to the jury contained interrogatories which [*8] identified the amount of compensatory or nominal damages and the amount of punitive damages. n3 Since the jury awarded punitive damages against both defendant Police Officers in the Civil Rights Suit, they clearly found, in accordance with the trial court instructions, that the Police Officers acted with evil motive or intent, or with reckless and callous disregard of, or indifference to, the rights or safety of McAneny. "[T]he jury is presumed to follow the court's instructions". State v. Williams, 204 Conn. 523, 534 (1987).

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n3 The verdict-interrogatory form was completed by the jury as follows:

"PLAINTIFF'S VERDICT

1. In this case do you find the issues in favor of the plaintiff as to Defendant Innamorato? Yes X NO

2. In this case do you find the issues in favor of the plaintiff as to Defendant Conzo? YES X NO

If your answer to Question 1 or 2 was "yes" proceed to Questions 3 and 4.

3. Plaintiff shall receive compensatory or nominal damages in the amount of $ 30,000

4. Plaintiff shall receive punitive damages in the amount of $ 60,000"

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[*9]

Section 7-101a of the General Statutes provided at the times relevant to this case n4, in pertinent part, the following:

"(a) Each . . . city . . . shall protect and save harmless any . . . full-time municipal employee, of such municipality from financial loss and expense, including legal fees and costs, if any, arising out of any claim, demand, suit or judgment by reason of alleged negligence, or for alleged infringement of any person's civil rights, on the part of such employee while acting in the discharge of his duties.

(b) In addition to the protection provided under subsection (a) of this section, each . . . city . . . shall protect and save harmless any such . . . full-time municipal employee from financial loss and expense, including legal fees and costs, if any, arising out of any claim, demand or suit instituted against such officer or employee by reason of alleged malicious, wanton or wilful act or ultra vires act, on the part of such . . . employee while acting in the

discharge of his duties. In the event such . . . employee has a judgment entered against him for such act in a court of law, such municipality shall be reimbursed by such . . . employee for expenses [*10] it incurred in providing such defense and shall not be held liable to such officer and employee for any financial loss or expense resulting from such act."

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n4 Public Acts 1989, No. 89-378, amended @ 7-101a by substituting "municipality" for city etc., defining municipality and making it clear that "such act" refers to "malicious, wanton or wilful" acts.

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The plaintiff argues that since subsection (a) of @ 7-101a requires a municipality to indemnify its employees for all financial loss and expenses "arising out of any . . . judgment . . . for alleged infringement of any person's civil rights, " and since the subsection does not limit this liability solely to compensatory damages, the City of West Haven was required to indemnify the Police Officers for the punitive damage award. This argument is flawed because it looks at @ 7-101a solely through the lens of subsection (a) and does not consider subsection (b). "It is an accepted principle of statutory construction that, if possible, the component parts of a statute [*11] shall be construed harmoniously in order to render an overall reasonable interpretation." Galvin v. Freedom of Information Commission, 201 Conn. 448, 456 (1986). Construing subparagraph (a) as requiring indemnification for damages resulting from wilful or wanton acts would fly in the face of subsection (b) which provides that the municipality is to pay for the defense of claims predicated on malicious, wanton or wilful acts, but if a judgment is entered finding the municipal employee acted in such a manner, then the employee must reimburse the municipality for the costs of the defense and the municipality shall not be liable for indemnification of any financial loss resulting from such malicious, wilful or wanton acts. The court is "entitled to presume that, in passing a statute, the legislature not only did so with knowledge of the existing statutes but also that it did not intend to enact a conflicting statute." Perille v. Raybestos-Manhattan-Europe, Inc., 196 Conn. 529, 541 (1985). n5

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n5 Even if there was room for any other interpretation, which the courts find that there is not, a strict construction of the statute is required because it is in derogation of the common law. Ahern v. New Haven, 190 Conn. 77, 82 (1988); Edmundson v. Rivera, 169 Conn. 630, 633 (1975).

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[*12]

Furthermore, if it was the intention of the legislature to require the municipality to indemnify its employees for punitive damages caused by wilful and wanton acts under subsection (a), there would have been no purpose for the enactment of Public Acts 1977, No. 77-399 which added subsection (b) to @ 7-101a requiring the municipality to be initially responsible for the defense of such claims and suits. When changes or additions are made to a statute it is not to be assumed that there was no purpose for them. King v. Board of Education (Watertown), 203 Conn. 324, 335 (1987). Indeed, this 1977 amendment adding subsection (b) makes it certain that the legislature never intended that subsection (a) would cover punitive damages for wilful and wanton acts. Subsequent legislative acts "may throw light on the legislative intent of a former related act." General Realty Improvement Co. v. New Haven, 133 Conn. 238, 242 (1946). Finally, the legislative history makes clear that the purpose of subsection (b) was to add the right to a defense only in a frivolous case claiming wilful and wanton acts which did not exist under subsection (a). See remarks of Representative Dorothy Barnes, [*13] 20 H.R. Proc., Pt. 7, 1977 Sess. p. 2843. "Statements made on the floor of the house, although not controlling, may be judicially noticed and are a strong indication of legislative intent." Manchester Sand & Gravel Co. v. South Windsor, 203 Conn. 267, 276 (1987).

Section 7-415 of the General Statutes, also relied upon by the plaintiff, provides in pertinent part the following:

"Any . . . city . . ., notwithstanding any inconsistent provision of law, general, special or local, shall pay on behalf of any employee of such municipality, . . . all sums which such employee becomes obligated to pay by reason of the liability imposed upon such employee by law for damages awarded for infringement of any person's civil rights or for physical damages to person or property, except as hereinafter set forth, if the employee, at the time of the occurrence, accident, physical injury or damages complained of, was acting in the performance of his duties and within the scope of his employment, and if such occurrence, accident, physical injury or damage was not the result of any wilful or wanton act of such employee in the discharge of such duty." (emphasis supplied)

The clear [*14] and unambiguous language of the statute underscored above by the court excludes indemnification when the act of the municipal employee is wilful or wanton. Since the statute is clear and the language unambiguous, there is no room for construction. Lamb v. Burns, 202 Conn. 158, 168 (1987). Liability for damages as a result of wilful and wanton acts of its employees is clearly excluded.

The plaintiff West Haven claims, however, that the recklessness and callousness that give rise to punitive damages under @ 1983 is not the equivalent of wanton acts excluded under the state statutes. Accordingly, West Haven argues that since the jury in the Civil Rights Suit did not indicate the basis for the punitive damages, -- that is, whether they found the conduct of the Police Officers to be wilful (which West Haven concedes would not be covered) or that they acted in a reckless and callous manner (which West Haven argues would be covered), -- it was required to indemnify the Police Officers.

The simple answer to West Haven's argument is that wanton acts are the equivalent to acts done recklessly or in callous disregard of, or indifference [illegible] the rights or safety of others. n6 This is [*15] the plain meaning of wantonness. Webster's Third New International Dictionary ("marked by or manifesting heedless disregard of justice or of the rights, safety, and feelings of others"). "Words and phrases of a statute are to be construed according to the commonly approved usage of the language." Ganim v. Roberts, 204 Conn. 760, 763 (1987). Furthermore, the courts have consistently defined wanton misconduct to be a reckless disregard of the rights of others. Markey v. Santangelo, 195 Conn. 76, 78 (1985); Bordonaro v. Senk, 109 Conn. 428, (1929); Menzie v. Kalmonowitz, 107 Conn. 197, 199 (1928) "[T]echnical common law words when used in a statute without definition will generally be construed in that sense unless a contrary intention appears from the context"; Gentry v. Norwalk, 196 Conn. 596, 605 (1985) (quoting Jones v. Magruder, 42 F. Supp. 193, 197 (D. Md. 1941)); and even if not technical, the court may look to the common understanding expressed in the law. Beloff v. Progressive Casualty Ins. Co., 203 Conn. 45, 59 (1987). Black's Law Dictionary (5th ed.) ("[o]ne done in reckless disregard of the rights of others . . . and is such conduct as indicates [*16] a reckless disregard of the just rights or safety of others. . . .")

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n6 Notwithstanding the claims of the plaintiff to the contrary, the distinction between "disregard of" or "indifference to" when preceded by the adjective "callous" is a "distinction without a difference."

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The decision that punitive damage awards against police officers and other municipal employees that are predicated on acts or other behavior which is wilful or wanton will not be indemnified by the City is consistent with the purposes of an award of such damages. There may be good reason for requiring the public purse to respond to compensatory damages. A harm inflicted by a public employee acting under color of law should be borne by the public to make the injured person whole. Punitive damages, however, "are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future." Restatement (Second) Torts @ 908(1). The [*17] very nature of punitive damages makes it inappropriate to require the municipality to assume the burden. "Regarding retribution, it remains true that an award of punitive damages against a municipality 'punishes' only the taxpayers, who took no part in the commission of the tort. These damages are assessed over and above the amount necessary to compensate the injured party. Thus, there is no question here of equitably distributing the losses resulting from official misconduct. Indeed, punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers." (citations omitted) Newport v. Fact Concerts, Inc., supra at 267.

On the other hand, hitting the pocketbook of those who intentionally or wantonly infringe on the rights of others, such as in the case of these Police Officers, is a positive way of insuring that such outrageous conduct will not be repeated by these officers. Equally important, [*18] it sends a message to all public employees that such conduct will not be condoned or tolerated in ou democracy that places high value on the rights of individuals. Public servar must be made aware that when such reprehensible, intentional or wanton conduc occurs not only does it jeopardize the admissibility of evidence in criminal cases, and their jobs, but also their own personal assets. "By allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute directly advances the public's interest in preventing repeated constitutional deprivations." Id. at 269.

In sum, the court finds that the plaintiff City of West Haven was not required to pay the punitive damages awarded in the Civil Rights Suit in favor of Tracy McAneny against the Police Officers Joseph Innamorato and Joseph Conzo. West Haven paid it as a mere volunteer without obligation under law. n7 Therefore, the defendant The Hartford Insurance Company has no responsibility to indemnify West Haven under the terms of its contract of insurance. Accordingly, the motion of the defendant The Hartford Insurance Company [*19] for summary judgment on the first count (No. 133) is granted.

-Footnotes-

n7 The waiver arguments of the plaintiff -- that is, the defendant waived any rights to contest its liability for punitive damages because it failed in the Civil Rights Suit (1) to provide independent counsel and (2) required counsel to submit interrogatories -- are totally without merit. Independent counsel was supplied for the defendants in the Civil Rights Suit. The judge submitted interrogatories to determine the amount of the punitive damages. The defenda would not be liable for punitive damages under any definition upon which the jury could award them. Accordingly, any fuller delineation of these damages would serve no purpose.

IN THE MATTER OF THE PETITION FOR REVIEW OF OPINION 552 OF THE ADVISORY COMMITTEE ON PROFESSIONAL ETHICS.

Argued November 19, 1985—Decided April 9, 1986.

David H. Ben-Asher, Essex County Counsel, argued the cause for appellant *pro se (David H. Ben-Asher*, attorney; *Janice Falivena*, Assistant County Counsel, on the briefs).

John C. Pidgeon, First Assistant Corporation Counsel, argued the cause for appellant City of Newark (*Rosalind Lubetsky Bressler*, Corporation Counsel, attorney).

Michael J. Hogan, Burlington County Solicitor, argued the cause for appellant *pro* se.

John F. Neary argued the cause for respondent Advisory Committee on Professional Ethics (*Connell, Foley & Ceiser*, attorneys; *John F. Neary* and *Theodore W. Geiser*, of counsel).

Fred G. Stickel, III, General Counsel, submitted a letter in lieu of brief on behalf of *amicus curiae*, New Jersey Institute of Municipal Attorneys.

The opinion of the Court was delivered by

HANDLER, J.

The issue in this case is whether a municipal attorney may represent both the municipality and individual officials or employees of that municipality when all have been sued as co-defendants in a civil rights action under 42 *U.S.C.* § 1983. The Supreme Court's Advisory Committee on Professional Ethics (ACPE or Committee) ruled in *Opinion 552* that it is never proper for an attorney simultaneously to represent a governmental entity and any of its officials or employees when they are co-defendants in such a civil rights action. We granted motions by interested parties for a meritorious review of *Opinion 552*. For the reasons stated in this opinion, we modify the determination of the ACPE.

I.

[1] Resolution of the ethics issues addressed by *Opinion 552*, 115 *N.J.L.J.* 96 (1985), requires an overview of 42 *U.S.C.* § 1983 and the kinds of law suits that may be brought under this enactment. The statute provides:

> [E]very person, who under color of any statute, ordinance, regulation, custom or usage of any state or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

The rights protected under this enactment are principally (1) due-process rights, (2) equal-protection rights, (3) privileges and immunities of citizens, (4) rights owing their existence to federal functions, and (5) rights created by federal statutes. *C.J. Antineau,* Federal Civil Rights (1971).

While § 1983 refers to the culpable party as "every person," local government entities, as well as their individual officials and employees, can be held accountable under § 1983. *Monell v. New York City Dept of Soc. Servs.*, 436 *U.S.* 658, 98 *S.Ct.* 2018, 56 *L.Ed.*2d 611, 635 (1978). To recover from an official or employee, it is enough to show that such a person acting under color of state law caused the deprivation of a federal right. *Monroe v. Pape,* 365 *U.S.* 167, 81 *S.Ct.* 473, 5 *L.Ed.*2d 492 (1961). In contrast, local governmental bodies are liable under § 1983 only for wrongful actions that were taken to implement or execute a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body. *Monell v. New York City Dept of Soc. Servs., supra.* Significantly, local government bodies are not liable under § 1983 on a *respondeat superior* theory for every deprivation inflicted under color of state law by a local official. *Id.* 436 *U.S.* at 691, 98 *S.Ct.* at 2036, 56 *L.Ed.*2d at 636. It is evident therefore that under varying circumstances an aggrieved person can sue either a local government official, or the government entity that employs the official, or both, and different remedial relief will be available in terms of the identities of the parties-defendant. When both an entity and official are named as defendants, a conflict of interest between them may arise. This actual or potential conflict of interest poses the ethical issue that is the crux of *Opinion 552.*

In a § 1983 suit against both the governmental entity and individual government officials, the governmental entity, in an effort to shift liability, may claim that the assertedly wrongful conduct of the individuals was unauthorized and outside the scope of the employment. Conversely, in his or her defense, an employee-defendant may claim that the alleged offending conduct was taken pursuant to an official governmental policy or directive and that the governmental entity is the party properly responsible and ultimately liable. Thus, under the defenses asserted or available, one party-defendant may seek to avoid or lessen its exposure at the expense of the other.

The Committee in *Opinion 552* recognized that where a governmental official or employee has been named as a co-defendant in a § 1983 civil rights action against a municipality, the attorney who undertakes representation of both defendants may be in a situation of potential conflict. Indeed, the Committee was of the view that a potential conflict of interests was almost invariably present in these situations, and therefore such potential conflicts could be overcome effectively only by an absolute prohibition against multiple representations. The Committee considered that an alternative approach consisting of an *ad hoc* avoidance of conflicts of interest on an individual, case-by-case basis was too uncertain and inconsistent to be the basis for a satisfactory and workable rule. *Ibid.*

We agree with the Committee that there is undoubtedly a concern here for potential conflicts. However in view of the fact that in certain § 1983 actions no conflict of interest problems will ever exist, or that in others the cause may be summarily disposed without factual controversy as to the respective roles of the defendants, an absolute rule requiring separate counsel at the initial pleading stages is not required to adhere to traditional ethical precepts. We believe that where a potential conflict of interests may be present, it is not necessary to abandon the ethics guidelines of the Rules of Professional Conduct, which control generally the responsibility of attorneys confronted with conflicts of interests in the representation of clients.

II.

The overbreadth of an absolute bar against multiple-client representation in virtually all § 1983 civil rights actions can be illustrated by several prototypical situations. The overinclusiveness of the restriction is most apparent in those circumstances where a governmental officer or employee is charged by the complaint solely in an "official capacity," as opposed to when such an individual is sued in his "personal capacity."

> Personal-capacity suits seek to impose personal liability upon a governmental official for actions he takes under color of state law. *See, e.g., Scheuer v. Rhodes*, 416 *U.S.* 232, 237–238, 40 *L.Ed.*2d 90, 94 *S.Ct.* 1683 [1686–87] 71 Ohio Ops.2d 474 (1974). Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell v. New York City Dept. of Social Services*, 436 *U.S.* 658, 690, n. 55, 98 *S.Ct.* 2018 [2035, n. 55] 56 *L.Ed.*2d 611 (1978). As long as the government entity receives notice of an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. *Brandon v. Holt*, 469 *U.S.* at ——, 105 *S.Ct.* 873, 83 *L.Ed.*2d 878. It is *not* a suit against the official personally, for the real party interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself [*Kentucky v. Graham*, — *U.S.* ——, ——, 105 *S.Ct.* 3099, 3105, 87 *L.Ed.*2d 114, 121 (1985).]

On its face, *Opinion 552* would require independent counsel for a municipal official even where a § 1983 complaint alleges no more than that the employee-defendant took actions pursuant to an official policy of the municipality. In other situations, even when pleadings are susceptible of suggesting a cause of action against the individual official or employee in a "personal capacity," it may otherwise appear, or the government body may concede, that the § 1983 action against the individual is of the "official capacity" variety, *i.e.*, that the official or employee acted in furtherance of official policy. In these contexts, no conflict of interests exists. The official is not the "real" defendant in terms of actual responsibility and ultimate liability. See *Brandon v. Holt*, 469 *U.S.* ——, 105 *S.Ct.* 873, 83 *L.Ed.*2d 878 (1985); *Goodwin v. Circuit Court of St. Louis County*, 741 *F.*2d 1087, 1088–89 (8th Cir.) *cert.* denied — *U.S.* ——, 105 *S.Ct.* 112, 83 *L.Ed.*2d 55 (1984); *Familias Unidas v. Briscoe*, 619 *F.*2d 391, 403 (5th Cir.1980); *Shadid v. Jackson*, 521 *F.Supp.* 87, 91 (E.D.Tex.1981). In such circumstances, there is realistically no possibility for a conflict of interests in the joint representation of the governmental agency and the individual defendant. Both parties will presumably raise the identical defense, namely, that the actions effectuated a governmental policy but no wrongful deprivation of federal rights occurred. *See Aetna Casualty and Sur. Co. v. United States*, 570 *F.*2d 1197, 1200 (4th Cir.), *cert.* denied 439 *U.S.* 821, 99 *S.Ct.* 87, 58 *L.Ed.*2d 113 (1978); *Sherrod v. Berry*, 589 *F.Supp.* 433, 438 (N.D.Ill.1984).

[2] Moreover, even in personal-capacity suits there may be situations in which no conflict of interests can arise. *See Dunton v. County of Suffolk*, 580 *F.Supp.* 974 (E.D.N.Y.1983). In cases where only injunctive relief is sought or where compensatory damages are claimed alone or together with injunctive relief, no conflict will be found to exist if the responsibility for effectuating or providing such relief devolves upon the governmental body. With respect to responsibility for compensatory relief, government bodies often are contractually obligated to indemnify their officials for such damages. Any money judgment against an individual would ultimately be paid by the governmental body. For example, New Jersey construes its statutory defense and indemnification obligations under the Tort Claims Act, *N.J.S.A.* 59:10–1 to 4; *N.J.S.A.* 59:10A–1 to -6, as extending to the defense of actions brought pursuant to 42 *U.S.C.* § 1983. *See Davidson v. O'Lone*, 752 *F.*2d 817 (3d Cir.1984); see also *Gamble v. Florida Dept of Health and Rehabilitative Servs.*, 779 *F.*2d 1509 (11th Cir.1986) (the state through its risk management fund will indemnify its officers, employees, or agents in a § 1983 personal-liability damage action if they have not acted intentionally).

In the personal-capacity civil-rights actions, the critical question concerning improper and inappropriate multiple-client representation will typically involve those suits in which monetary damages are sought against both classes of defendants, the governmental entity and the individual government officials or employees, and not simply against the governmental entity. In some instances other factors, in addition to disparate financial liability, such as personal responsibility and the need for vindication in the face of particular charges, may be important to civil rights defendants, serving to drive them apart in their defenses. These may be another source of potential conflict.

The potential that conflicts of interests may arise exists whenever the claims asserted could subject the individual defendant to personal liability for which indemnification is unavailable.[1] *See Sherrod v. Berry, supra,* 589 *F.Supp.* at 438; *Bell v. City of Milwaukee,* 536 *F.Supp.* 462, 477–78 (E.D.Wis. 1982). An example is the claim giving rise to punitive damages. In both federal and state civil-rights actions, and tort actions under New Jersey law, punitive damages can be assessed against an individual on the basis of his intentional, malicious, or, in some cases, merely reckless conduct. *See Smith v. Wade,* 461 *U.S.* 30, 103 *S.Ct.* 1625, 1637, 75 *L.Ed.*2d 632 (1983); *City of Newport v. Fact Concerts, Inc.,* 453 *U.S.* 247, 266–67, 101 *S.Ct.* 2748, 2759, 69 *L.Ed.*2d 616 (1981); *DiGiovanni v. Pessel,* 55 *N.J.* 188 (1970); *Berg v. Reaction Motors Div.,* 37 *N.J.* 396 (1962). Nevertheless, municipalities are specifically immune from such punitive damages under § 1983. *City of Newport v. Fact Concerts, Inc., supra.* Moreover, in all such cases the indemnification of the officer or employee for exemplary damages is precluded by New Jersey state law. *See*

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[1] At the county and municipal level a potential for a conflict might exist with a claim for compensatory damages since, with limited exceptions, the indemnifications of county and municipal employees is not required by law. *N.J.S.A.* 59:10–4; see *N.J.S.A.* 40A:14–28 (indemnification for local firefighters); *N.J.S.A.* 40A:14–155 (indemnification for local police officers); *N.J.S.A.* 18A:16–6 (indemnification for school board officers and employees).

N.J.S.A. 59:10–1; *T & M Homes, Inc. v. Pemberton Township*, 190 *N.J.Super.* 637 (Law Div.1983).

It is the specter of punitive damages creating a conflict of interests that prompted the Committee to adopt its *per se* rule. The Committee previously determined that a municipal attorney may not represent any or all municipal officials who have been charged with willful civil-rights violations under 42 *U.S.C.* § 1983, even if the municipality is not a party to the suit. *Opinion 534*, 114 *N.J.L.J.* 53 (1984). In ruling that the municipal attorney could not represent any of the officials, the Committee noted that

> [i]n the event the Section 1983 action is successful and involves punitive damages, the matter of indemnification for costs and punitive damages is put in issue between the official and the municipality. Since the municipal attorney must be free to exercise his independent judgment in advising and defending the municipality on the indemnification claim, that municipal counsel cannot properly represent the municipal official against whom the action was brought. [*Id.* at 68.]

Due to the potential punitive damages liability of each official individually, the Committee ruled that each official must be represented by independent counsel. *Id.*

It is apparent that the conflicts of interests problems arising in this area are myriad and complex. However, while the potential for conflicts is real, experience indicates that the Court's ethics rules and guidelines can adequately protect the interests of all parties. *RPC* 1.7(a) provides that a lawyer shall not represent a client if the representation of that client will be directly adverse to another client unless the lawyer has a reasonable belief that the representation will not adversely affect the relationship with the other client and each client has consented after a full disclosure of the circumstances. *RPC* 1.7(b) prevents a lawyer from representing a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person. This restriction is subject to the independent assessment of the lawyer who may retain both clients if he reasonably believes the representation will not be adversely affected, and the clients agree to dual representation after a full disclosure of the circumstances is made by the attorney. *RPC* 1.7(b)(2).[2]

[3] We recognize that under an exception to the consent-waiver rule, a public entity as a government client cannot consent to multiple representation that perpetuates or engenders a conflict of interests. *RPC* 1.7(a)(2). The nonavailability to government attorneys of the consent-waiver exception, which would otherwise allow dual representation of clients with conflicting interests, is dictated by special concerns over the appearance of impropriety in the public sector. In *In re Opinion 415, supra,* 81 *N.J.* at 324 we stated the rationale for the closer scrutiny: "[w]hen representation of public bodies is involved, the appearance of impropriety assumes an added dimension. Positions of public trust call for even more circumspect conduct." Due to the sensitivity of their roles, attorneys for governmental bodies are subject to closer scrutiny under the appearance-of-impropriety standard than non-governmental attorneys. *See Ross v. Canino,* 93 *N.J.* 402, 409 (1983); *In re Opinion 452 of the Advisory Comm. on Professional Ethics, supra,* 87 *N.J.* at 50; *Perillo v. Advisory Comm. on Profes-*

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[2] The substantive standards of RPC 1.7 are derived from the former Disciplinary Rules and decisional authority addressing this subject matter. *See* DR 5-105 (refusing to accept or continue employment if the interests of another client may impair the independent professional judgment of the lawyer); DR 5-106 (settling similar claims of clients). In the absence of an actual conflict of interest, the appearance of impropriety alone may be a sufficient basis to bar an attorney from representing conflicting parties. *See In re Garber,* 95 *N.J.* 597, 609-11 (1984); *In re Opinion 452 of the Advisory Comm. on Professional Ethics,* 87 *N.J.* 45, 49; *Perillo v. Advisory Comm. on Professional Ethics,* 83 *N.J.* 366, 370-73 (1980); *In re Opinion 415,* 81 *N.J.* 318, 323 (1979); *see also In re Professional Ethics Opinion 452, supra,* 87 *N.J.* 48 (attorney or members of one law firm may not hold both the position of municipal prosecutor and a position of planning board attorney for the same municipality). *Opinion 366,* 100 *N.J.L.J.* 290 (1977) (attorney cannot represent board of adjustment in same municipality where his partner is municipal attorney); *Opinion 199; Opinion 164,* 92 *N.J.L.J.* 831 (1969) (attorney cannot accept appointment as attorney for municipal planning board when partner is an attorney for the same municipality).

sional Ethics, supra, 83 *N.J.* at 373; *In re Opinion 415, supra,* 81 *N.J.* at 324. Accordingly, in the case of an actual conflict in a § 1983 action involving multiple representation (for example, where a governmental body refuses to indemnify its co-defendant officials or employees) consent of the parties to joint representation will not satisfy the requirements of *RPC* 1.7. To this extent we agree with the Committee.

[4] We believe that the appropriate rule for dealing with potential conflicts of interests in the context of a § 1983 action must be grounded upon common sense, experience, and realism. These considerations forcefully suggest that the joint representation of clients with potentially differing interests is permissible provided there is a substantial identity of interests between them in terms of defending the claims that have been brought against all defendants. The elements of mutuality must preponderate over the elements of incompatibility. *See Brown & Williamson Tobacco Corp. v. Daniel Int'l. Corp.*, 563 *F.*2d 671, 673 (5th Cir.1977); *see also Goodwin Motor Corp. v. Mercedes Benz of N. America, Inc.*, 172 *N.J.Super.* 263, 273 (App.Div.1980) (law firm may represent multiple plaintiffs in franchise termination and bankruptcy action); *DeLuca v. Kahn Brothers, Inc.*, 171 *N.J.Super.* 100, 107 (Law Div.1979) (township planning board and zoning board may cooperate and employ single counsel subject to ethical rule). This approach has been followed by the Committee itself in permitting dual representation in certain circumstances. *See, e.g., Opinion 509,* 111 *N.J.L.J.* 16 (1983) (representation of employer and employee in employee licensing proceeding); *Opinion 270,* 96 *N.J.L.J.* 1332 (1973) (representation of commercial association and individual business member); *Opinion 47,* 87 *N.J.L.J.* 449 (1964) (representation of husband and co-respondent in matrimonial matter). The Committee also tacitly acknowledged the viability of this approach in *Opinion 552.* While the Committee proscribed any joint representation by the attorney of the government employer and its employees in a § 1983 civil rights action, it ruled that there would be "no ethical prohibition on one attorney repre-

senting all of the individual co-defendants if the provisions of *RPC* 1.7 are complied with."

[5] Admittedly, it will not be easy to apply this rule in all cases. Critical to a determination that co-defendants with potentially conflicting interests have a substantial identity of interests that can be said to outweigh their potential conflicts is whether, under the facts involved, the defendants would present consistent defenses to the claims brought against them. *Kerry Coal Co. v. United Mine Workers of America,* 470 *F.Supp.* 1032, 1036-37 (W.D.Pa.1979); *Spindle v. Chubb/Pacific Indem. Group,* 89 *Cal.App.*3d 706, 152 *Cal.Rptr.* 776, 780 (Ct.App.1979). In these circumstances, the representation of multiple parties may be permitted even if the positions may appear to be somewhat potentially conflicting. *Rice v. Baron,* 456 *F.Supp.* 1361, 1375 (S.D.N.Y.1978); *Realco Servs., Inc. v. Holt,* 479 *F.Supp.* 867, 875 (E.D.Pa.1979); *Brown & Williamson Tobacco Corp. v. Daniel Int'l. Corp., supra,* 563 *F.*2d at 673. Joint representation will not automatically be prohibited due to an apparent divergence of interests on the face of the complaint. *Richmond Hilton Assocs. v. City of Richmond,* 690 *F.*2d 1086, 1089-90 (4th Cir.1982); *Supreme Court Directive dated October 8, 1970,* 93 *N.J.L.J.* 712 (1970); *see Opinion No. 156,* 92 *N.J.L.J.* 481 (1969). Thus, joint representation will be permissible if it does not appear clearly from the pleadings or from early discovery that the claims against the governmental entity and its individual employees will result in different and inconsistent defenses, or will, if successful, probably lead to independent or several, rather than overlapping or joint, compensatory relief against each class of defendants.

III.

In rejecting the ACPE's blanket, dual-representation ban and adopting a more individualized approach, we reflect the difficulty encountered in applying *per se* rules to varied ethical questions in the public sector.[3] *See, e.g. In re Opinion No. 452,* 87 *N.J.* 45, 50 (1981); *Perillo v. Advisory Comm. on Professional Ethics, supra; In re Dolan,* 76 *N.J.* 1 (1978). As in other areas, the problem of multiple representation is best addressed by an evaluation by the individual attorney of the circumstances of each case, so that he or she may determine whether the common representation of the prospective clients can be undertaken. *Schear v. Elizabeth,* 41 *N.J.* 321, 328 (1964); *accord In re Opinion 415, supra,* 81 *N.J.* 324 (1979); *Opinion 333,* 99 *N.J.L.J.* 496 (1976); *Opinion 100,* 89 *N.J.L.J.* 696 (1966). In every such case the attorney will have to be satisfied based on objective reasonableness that there is no direct adversity between the defendants and that joint representation will not adversely affect the relationship of either class of defendants, *RPC* 1.7(a), nor materially limit his or her professional responsibilities towards any such client-defendant, *RPC* 1.7(b). Although this case-by-case approach cannot guarantee that ethical problems will not arise, the danger is not of sufficient weight to warrant a *per se* prohibition.

We are additionally moved by the severe financial strains the *per se* rule imposes on local governments and those individual employees who are forced to obtain independent counsel. *See Reardon v. Marlayne, Inc.,* 83 *N.J.* 460, 473 (1980). Such burdens are not justified in the absence of a demonstrable, albeit potential, conflict of interests realistically militating against effective representation and lawyer-client fidelity. *See*

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[3] Only in the most sensitive circumstances have we imposed a *per se* rule of disqualification for potential conflicts of interest. In the past we have by administrative directive prohibited the joint representation of driver and passenger in automobile negligence cases (other than those involving husband and wife or parent and child). In *Opinion 243,* 95 *N.J.L.J.* 1145 (1972), the ACPE recognized the inappropriateness of usurping the "judgment [that must] be made by each attorney as the situation arises . . ." It noted that "any attempt by this committee to promulgate guidelines would be presumptuous and raise the inference that lawyers could not be trusted to make proper decisions" as to whether they could adequately represent both parties. *Accord Opinion 527,* 113 *N.J.L.J.* (1984).

State v. Bell, 90 *N.J.* 163 (1982) (multiple representation in the same criminal action by a public defender's office does not in itself give rise to a presumption of prejudice); *State Health Planning and Coordinating Council v. Hyland,* 161 *N.J.Super.* 468, 476 (App.Div.1978); *Opinion 333, supra;* Epstein, *Conflicts of Interest: A Trial Lawyer's Guide* (1984), at 22. Moreover, as noted by the Committee itself, the blanket prohibition of *Opinion 552* will also encourage plaintiffs to name numerous officials solely to improve their bargaining position with the government defendant by forcing defendants to engage separate independent counsel. *See Van Horn v. Wm. Blanchard Co.,* 88 *N.J.* 91, 99 (1981) (dissenting opinion). As a result, the administration of justice will suffer from the increased litigational burden, as will the dispensation of justice, since government defendants could be bludgeoned by the rule into settling cases for reasons wholly unrelated to the merits of any liability claim.

It is of some significance that in a given case a government body may affirmatively remove any potential conflict of interest. See discussion *supra* at 200. If the governmental body chooses to reduce its legal costs by providing joint representation, it then will be necessary that the entity to take steps to reduce or eliminate any potential conflict of interests that may otherwise exist. For example, the government body could in an appropriate case agree that the officials or employees were acting within the scope of their duties, and waive any claim it may have against the employee for reimbursement of legal expenses and agree to indemnify the employee for the amount of any individual judgment.

[6] In the event that a municipal attorney represents co-defendants in a § 1983 action involving possible conflicts of interests, the administration of justice could be affected. To that end the attorney will be required to alert the defendants at the earliest opportunity that the case may present problems in terms of joint representation. The attorney will also be

charged with bringing conflicts of interests matters to the attention of the court, which should take steps to assure that notice of any potential conflict of interests is provided to affected litigants and that the ethics problem is resolved satisfactorily and made a matter of record. *See Dunton v. County of Suffolk*, 729 *F.*2d 903 (2d Cir.1984); *Manganella v. Keyes*, 613 *F.Supp.* 795, 799 (D.Conn.1985); *see also State v. Belluci*, 81 *N.J.* 531 (1980) (trial court is obligated to protect defendant's rights to effective assistance of counsel and when multiple representation is involved, situation must be explored on record both to ensure that defendant is aware of potential hazards and to secure proper waiver). In that way lawyers will be encouraged to act reasonably and responsibly, the essential interests of clients will be protected, and the interests of justice will be secured.

In conclusion, we determine that the *per se* ban as formulated by the Committee, prohibiting joint representation of multiple defendants in all § 1983 civil-rights actions, is too broad. We rule that in situations in which there is no actual conflict of interests, or the likelihood of an actual conflict of interests is remote and poses no realistic threat to the effective representation of such multiple defendants, an attorney should not be prohibited from representing both parties. We rule further that in cases where there is a potential conflict of interests joint representation may be allowed, provided the guidelines of our current Rules of Professional Conduct are followed by the attorney furnishing such joint representation. Stated somewhat differently, we rule that in a § 1983 action, a government attorney is precluded from representing co-defendant government officers or employees only where the allegations or the facts as developed present an actual conflict of interests or the realistic possibility of such a conflict. If no such conflict is presented, then a government attorney may simultaneously represent as co-defendants governmental officers or employees and the government entity. This joint representation, however, is conditioned upon the continuing obligation of the attorney to ascertain whether there exist potential conflicts of interests among the defendants, and if, under the circumstances, such potential conflicting interests emerge that outweigh the mutuality or similarity of the interests among defendants, the attorney shall be obligated promptly to terminate such joint representation and initiate steps for the separate representation of the defendants.

We therefore accordingly modify *Opinion 552.*

For modification: Chief Justice WILENTZ and Justices CLIFFORD, HANDLER, POLLOCK, O'HERN, GARIBALDI and STEIN—7.

Opposed: none.

5TH CASE of Level 2 printed in FULL format.

CHESTER COUNTY INTERMEDIATE UNIT, LINCOLN INTERMEDIATE UNIT, MR. and MRS. JOHN M. GILLESPIE, and MR. and MRS. KEVIN NONEMAKER, Appellants v. PENNSYLVANIA BLUE SHIELD and CAPITAL BLUE CROSS

No. 89-5577

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

896 F.2d 808; 1990 U.S. App. LEXIS 2692

November 28, 1989, Argued February 28, 1990, Filed

PRIOR HISTORY: [**1]
On Appeal from the United States District Court for the Middle District of Pennsylvania, D.C. Civil No. 88-1773.

COUNSEL: Allen C. Warshaw (Argued) Duane, Morris & Heckscher, Harrisburg, Pennsylvania, Attorney for Appellants.

Thomas E. Wood (Argued) Donna S. Weldon, Keefer, Wood, Allen & Rahal, Harrisburg, Pennsylvania, Attorneys for Appellee, Pennsylvania Blue Shield.

Mary Jane Forbes (Argued) McNees, Wallace & Nurick, Harrisburg, Pennsylvania, Attorney for Appellee, Capital Blue Cross.

Ernest N. Helling, Acting Chief Counsel, Debra R. Cruel, Assistant Counsel, Harrisburg, Pennsylvania, Attorneys for Amicus Curiae, Pennsylvania Department of Education.

JUDGES: Sloviter and Becker, Circuit Judges, and Lifland, District Judge.

* Hon. John C. Lifland, United States District Court for the District of New Jersey, sitting by designation.

OPINIONBY: SLOVITER

OPINION: [*809] SLOVITER, Circuit Judge.

I.

Introduction

The principal issue before us is whether the Education of the Handicapped Act (EHA or Act), 84 Stat. 175, as amended, 20 U.S.C. @@ 1400 et seq., precludes companies offering medical and hospital insurance from excluding from coverage services provided free of charge under that Act. The parents [**2] of two handicapped children who received physical therapy as related services in conjunction with the mandated education required under the Act were covered by health insurance policies issued by defendants Capital Blue Cross and Pennsylvania Blue Shield (Blue Cross/Blue Shield). The intermediate educational units (IUs) which provided the physical therapy submitted bills to Blue Cross/Blue Shield for reimbursement, but Blue Cross/Blue Shield refused payment, relying on various contractual provisions. The parents and the IUs filed suit for a declaratory judgment. Defendants' motion to dismiss brought to issue the effect of the EHA on the obligation of Blue Cross/Blue Shield to reimburse subscribers or providers for certain services rendered pursuant to the Act. The district court dismissed the action, holding that the plaintiffs' claim was inconsistent with the reimbursement provisions of the applicable policy. The plaintiffs appeal.

II.

Facts and Procedural History

On review of an order dismissing the complaint, we must take as true all material facts as pleaded. Rogin v. Bensalem Township, 616 F.2d 680, 685 (3d Cir. 1980), cert. denied, 450 U.S. 1029 (1981).

Appellants [**3] Chester County Intermediate Unit (Chester IU) and Lincoln Intermediate Unit (Lincoln IU) are two of the twenty-nine area intermediate educational units formed as part of the Pennsylvania public school system. Appellants Mr. and Mrs. John Gillespie are the parents of a handicapped child, Todd, who was provided physical therapy by licensed physical therapists employed by or affiliated with Chester IU from October 5, 1987 through February 29, 1988. Appellants Mr. and Mrs. Kevin Nonemaker are the parents of a handicapped child, Kevin, who was provided physical therapy by licensed physical therapists employed by or affiliated with Lincoln IU from February 3, 1987 through November 4, 1987.

Both the Gillespies and the Nonemakers have policies with Pennsylvania Blue Shield and Capital Blue Cross covering their families' health care needs. The billing offices for the Chester and Lincoln IUs submitted the Nonemakers' and Gillespies' claims for payment to Blue Cross/Blue Shield. They apparently rely on the Major Medical benefits which supplement Blue Cross and Blue Shield basic coverage and provide coverage for, inter alia, "[physical] therapy prescribed by the attending provider as to type [**4] and duration when performed by a duly qualified physical therapist." Complaint at Exhibit A, App. at 63, and Exhibit B, App. at 121. The Gillespies and the Nonemakers attached the descriptive brochures they received covering such benefits to the complaint. The Major Medical provisions described in the two brochures are identical and, for convenience, we will refer to the document describing such benefits as the "policy."

When Blue Cross/Blue Shield disclaimed coverage, plaintiffs sought an administrative resolution of their claims. Both the Pennsylvania Insurance Department and the Pennsylvania Department of Education notified plaintiffs that they were not the appropriate fora to resolve the dispute. Plaintiffs then filed this suit as a class action in the district court. The complaint alleged that the Lincoln and Chester IUs were representatives of all IUs in Pennsylvania which provided special education and related services under the EHA and that the Nonemakers and Gillespies were representatives of all parents of handicapped children receiving special education and related services from licensed providers employed [*810] by or affiliated with Pennsylvania's IUs and who are covered by [**5] a Blue Cross/Blue Shield policy such as the one which covers the Nonemakers and Gillespies.

Blue Cross/Blue Shield filed a motion to dismiss under Fed.R.Civ.P. 12(b)(6). They argued that the provisions of the EHA requiring states to provide special education and related services to parents without charge and at public ense precluded shifting the costs of such services to those parents who carry health insurance. They also argued, inter alia, that the physical therapy services are not covered under any interpretation of the Blue Cross/Blue Shield Major Medical policy for several reasons. First, they contended that the policy covers only "medically necessary hospitalization and medical benefits," see App. at 60, and that notwithstanding the affidavits from the children's doctors stating that the physical therapy was medically necessary, see App. at 168-71, the physical therapy provided to the children would never have been prescribed by doctors but for the EHA. Second, Blue Cross/Blue Shield relied on the provision of the policy excluding coverage for services which the subscriber "is not legally obligated to pay" or which the subscriber is entitled to receive from [**6] a governmental unit or agency "without cost." Third, they relied on the reimbursement provisions of the policy, which they argued do not require them to make direct payment to a provider but only provide for reimbursement to the subscriber after submission of itemized bills and payment of the required deductible and coinsurance.

The district court dismissed the action. It stated, in agreement with plaintiffs' position, "that insurers are not relieved of contractual obligations they would otherwise have had had the [EHA] not been enacted." App. at 7 (emphasis in original). The court then examined the policy attached by plaintiffs to the complaint and held that as a matter of law Blue Cross/Blue Shield were not obligated under that policy to make payments to the IUs for the physical therapy treatments. Regarding the three contractual provisions relied on by Blue Cross/Blue Shield in denying reimbursement to the IUs, the court ted there was a disputed issue of fact as to whether the physical therapy vided to Todd Gillespie and Kevin Nonemaker would have been medically necessary if the EHA had not been enacted. The court assumed, for purposes of the motion, that the services would [**7] have been medically necessary.

The court held, however, that there was no disputed issue of material fact with respect to the procedure for reimbursement for Major Medical coverage. The court construed the policy as requiring payment directly to the subscriber, and held that there is no applicable provision for assignment. The court accepted defendants' contention that "because there is no actual charge upon which an appropriate Blue Shield reimbursement calculation could be based" and "no deductibles are paid," the reimbursement provisions of the policy bar payment. It stated that the plaintiffs' "suggested scheme for payments to be made directly to the IU's, totally disregards the [reimbursement] terms of the policy." Consequently, the court concluded that plaintiffs had not stated a cause of action upon which relief can be granted under the terms of their policy with Blue Cross/Blue Shield. Under this approach, the court never reached the issues of the construction and validity of the exclusionary provisions of the Blue Cross/Blue Shield policy. n1

-Footnotes-

n1 Because the district court held that the plaintiffs did not satisfy the reimbursement provisions of the policy and were not permitted to assign their policy benefits to the IUs, it also did not reach the argument of Blue Cross/Blue Shield that the McCarran-Ferguson Act, 15 U.S.C. @@ 1011-1015, hibits invalidation of the exclusionary provisions of the Major Medical policy. In light of our holding that the exclusionary provisions are dispositive of this case, we similarly need not reach this issue. Blue Cross/Blue Shield also argued that the IUs lack standing to assert claims under the Nonemakers' and Gillespies' policies. Because the Nonemakers and Gillespies are appellan and their standing is unquestioned, it is also unnecessary for us to reach the standing issue.

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[**8]

The scope of our review from the district court's grant of a motion to dismiss is [*811] plenary. Daly v. United States Dept. of the Army, 860 F.2d 592, 593 (3d Cir. 1988). III.

Discussion

A.

The EHA is a comprehensive program enacted by Congress to assist the states "in complying with their constitutional obligations to provide public education for handicapped children." Smith v. Robinson, 468 U.S. 992, 1009 , 82 L. Ed. 2d 746 , 104 S. Ct. 3457 (1984). Under the Act, federal funding to support education for handicapped children is available to states if they have in effect a "policy that assures all handicapped children the right to a free appropriate public education." 20 U.S.C. @ 1412 (1) (1988). The Act defines "free appropriate public education" as

> special education and related services that -- (A) have been provided at public expense, under public supervision and direction, and without charge, (meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414 (a)(5) . . .

20 U.S.C. @ 1401 (a)(18) (1988). n2

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n2 Under the Act, the term " special education" is defined as:

> specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

20 U.S.C. @ 1401 (a)(16) (1988). The term "related services" is defined as:

> transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

Id. at @ 1401(a)(17) (1988).

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[**9]

Although defendants agree with the district court's action in dismissing the complaint, they argue that the district court erred in construing the statutory language "free appropriate public education" to mean "free to the parents." Defendants argue that the IUs have a statutory duty to provide an appropriate public education for handicapped children at public expense, and they complain that the district court should have adopted their position that the EHA does not authorize shifting of costs to private insurers.

We see no reason to reach this amorphous issue in the context of this appeal. The district court's statement was not necessary to its decision. Even Blue Cross/Blue Shield concede that under some circumstances, they would be obliged to pay for physical therapy services furnished pursuant to a handicapped child's individualized education program. n3 We therefore leave consideration of the theoretical question of the meaning of a "free" appropriate education to the case where it is necessary to the disposition.

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n3 They state, for example, "[if] a handicapped child were receiving physical therapy services for which Blue Cross and Blue Shield paid prior to being enrolled in a special education program, the insurers could not discontinue payment and demand that the provider of those services bill the intermediate unit." Brief of Appellees at p. 32 n. 7.

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[**10]

Similarly, we are reluctant to decide this appeal as did the district court on the basis of the reimbursement scheme. The plaintiffs argue that the district court had no basis from the complaint to assume that there was no actual charge made on which a reimbursement calculation could be based, had no evidence with respect to the status of payment of deductibles and coinsurance, and could not properly rely on payment procedures or Assignment Account Guidelines which were not properly in evidence. It may be that the district court correctly analyzed these issues, but we are sensitive to plaintiffs' contention that there are relevant facts which were not of record and which should have been the subject of discovery. Accordingly, we [*812] leave undecided the issue of the reimbursement scheme. n4 It is more productive for us to examine whether the language of the policy relied on by plaintiffs purports to cover the physical therapy services at issue, and we turn in particular to the exclusions on which defendants rely.

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n4 We therefore need not consider Blue Cross/Blue Shield's contention that the requirement that the parents pay the applicable deductibles and coinsurance under the Major Medical policy is inconsistent with the Act's explicit provision that the related services must be "free". See Interpretation of 34 C.F.R. @@ 104 and 300 at 45 Fed.Reg. 86,390 (1980). Cf. Seals v. Loftis, 614 F. Supp. 302 (E.D.Tenn. 1985) (IU cannot require parents to use insurance proceeds if result is to decrease maximum lifetime benefits available under policy). Nor [illegible] we need to reach Blue Cross/Blue Shield's further claim that payment by the IUs of the deductibles and coinsurance, rather than by the parents, would not satisfy the provisions of the policy.

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[**11]

B.

Blue Cross/Blue Shield relied in the district court on the provisions in the Major Medical policy specifying that coverage is excluded for:

Services or supplies for which the subscriber is not legally obligated to pay:

Services or supplies paid or which the subscriber is entitled to have paid or to obtain without cost under the laws or regulations of any federal, state, provincial, or local government or any political subdivision thereof;

Complaint at Exhibit A, App. at 67-68, and Exhibit B, App. at 125-126. Plaintiffs suggest that neither the district court nor this court may properly rely on the brochure describing the Blue Cross and Blue Shield health plans which plaintiffs attached to the complaint. They contend that these matters are outside the bounds of the complaint and can be considered only after the motion to dismiss is converted into a Rule 56 summary judgment motion, allowing the parties a reasonable opportunity to present all pertinent materials. See Fed.R.Civ.P. 12(b); see also JM Mechanical Corp. v. United States, 716 F.2d 190, 196-97 (3d Cir. 1983).

Although plaintiffs now argue that the descriptive material attached to the complaint is not the [**12] actual policy or contract, n5 the plaintiffs, having themselves attached this material to their complaint and described the exhibits in the complaint as "true and correct [copies] of the [subscribers'] [policies] which [are] incorporated herein as though fully set forth," App. at 14, 15, are bound by them. The exhibits were properly considered by the district court in granting the motion to dismiss. See Quiller v. Barclays American/Credit, Inc., 727 F.2d 1067 (11th Cir. 1984), cert. denied, 476 U.S. 1124 , 90 L. Ed. 2d 673 , 106 S. Ct. 1993 , 106 S. Ct. 1993 (1986); Amfac Mortgage Corp. v. Arizona Mall, 583 F.2d 426 (9th Cir. 1978); Fed.R.Civ.P. 10(c) ("a copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."); cf. Rose v. Bartle, 871 F.2d 331, 339-40 n.3 (3d Cir. 1989) (distinguishing between documentary exhibits, such as contracts, which are written instruments for purposes of Rule 10(c), and affidavits, which are not). n6

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n5 The heading of the relevant portion of the attachment is "General Description of Your Blue Cross and Blue Shield Major Medical Benefits." App. at 60, 118. It is unclear from the record whether there is a separate contract with each subscriber, as distinguished from the subscriber's employer. [**13]

n6 In Goodwin v. Elkins & Co., 730 F.2d 99 (3d Cir. 1984), cert. denied, 469 U.S. 831 , 83 L. Ed. 2d 61 , 105 S. Ct. 118 (1984), we considered, without olving, the appropriateness of the district court's reliance on a partnership agreement, signed by the plaintiff, which was attached to the defendant's motion to dismiss. Judge Garth explicitly did not reach the question, see id. at 103 n. 6, 104 n. 9, Chief Judge Seitz stated that such reliance was in fact inappropriate, but was harmless error in that case, see id. at 111-12 (Seitz, J., concurring), and Judge Becker would have held that it was proper for the district court to rely on the partnership agreement, as it was "actually and necessarily relied upon in the allegation of [the complaint], and its authenticity [was] conceded." Id. at 113-14 (Becker, J., concurring).

Unlike the partnership agreement at issue in Goodwin, which was attached by the defendant to its motion to dismiss, the Blue Cross and Blue Shield brochures were attached by the plaintiffs to their complaint and incorporated by reference therein. The issue which the Goodwin court was unable to resolve is therefore not present in the instant case.

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[*813] Moreover, plaintiffs have [**14] not suggested to this court that these descriptive brochures are not accurate as to the scope of health care coverage provided in the respects relevant here. In fact, as to the exclusion on which we focus, the complaint specifically provides:

> Both the Gillespies' and the Nonemakers' insurance agreements exclude from yment by Blue Cross services or supplies for which the subscriber is not ally obligated to pay as well as services or supplies for which the subscriber is entitled to have paid or obtain without cost under the laws or regulations of any federal, state, provincial or local government or any political subdivision.

App. at 12. Indeed, these exclusions form the basis of one of the, if not the principal, legal arguments asserted on appeal. Accordingly, we are free to examine as a matter of law the effect of the exclusions pled by plaintiffs.

C.

It is undisputed that the children of the Gillespies and Nonemakers are entitled "to obtain without cost" under the EHA the physical therapy services provided and that the parents are "not legally obligated to pay" for these services. The exclusionary provisions, therefore, explicitly preclude Blue Cross/Blue Shield coverage [**15] of the physical therapy and they would appear to be dispositive of plaintiffs' claim. Plaintiffs, however, contend that the exclusionary provisions are in contravention of the provisions of, and public policy underlying, the EHA, as well as of regulations promulgated under the Act.

Plaintiffs rely on the following language in the EHA:

> Any State meeting the eligibility requirements . . . shall . . .
>
> (9) provide satisfactory assurance that Federal funds made available under this subchapter -- (A) will not be commingled with State funds, and (B) will be so used as to supplement and increase the level of Federal, State and local funds (including funds that are not under the direct control of State or local

educational agencies) expended for special education and related services provided to handicapped children under this subchapter and in no case to supplant such Federal, State or local funds. . . .

20 U.S.C. @ 1413 (a)(9) (1988). Plaintiffs contend that because this language requires that federal funds supplement, and not supplant, other available resources, the EHA cannot be relied on to relieve private insurers of otherwise valid contractual obligations.

We find it questionable [**16] whether this language has any application to private insurance funds, because it appears to be directed to supplementation of "Federal, State and local funds." There is no direct reference to private funds. However, even if we were to assume, arguendo, that the language "including funds that are not under the direct control of State or local educational agencies" refers to private insurance dollars, rather than public funds, at most this would bar supplanting, i.e., substitution, of federal funds for private funds previously expended for such services. This is a far cry from reading the language to require insurers to cover the costs of services which the policy excludes.

Plaintiffs point to a paragraph in the Senate Report which states:

Under the Committee Bill, a State's application shall provide that special education and related services shall be provided at no cost to the parents of a handicapped child. This provision is designed to insure that students served by private facilities are treated equally with those in public schools and is not to be construed to prohibit charges by the educational agency to insurers, public programs, and others for hospital care, health [**17] services, rehabilitation, and other non-educational services. States are encouraged to utilize all sources of support for comprehensive services for handicapped students.

S.Rep. No. 168, 94th Cong., 1st Sess. 32, reprinted in 1975 U.S.Code Cong. & Admin.News 1425, 1456 (emphasis added).

We find no support in this paragraph for plaintiffs' position that the Act prohibits [*814] insurers from excluding coverage for services that must be provided free under the Act. A statement that an agency is not prohibited from charging insurers for special education and related services simply cannot be transmuted into congressional intent to abrogate agreed-upon exclusions or to require insurers to cover costs for services which the parties agreed to exempt from coverage.

Plaintiffs purport to find support in the regulation implementing the Act promulgated by the Office of Special Education and Rehabilitative Services of the Department of Education which provides that:

(a) Each State may use whatever State, local, Federal, and private sources of support are available in the State to meet the requirements of this part. . . .

(b) Nothing in this part relieves an insurer or similar third [**18] party from an otherwise valid obligation to provide or to pay for services provided a handicapped child.

34 C.F.R. @ 300.301 (1988) (emphasis added).

This has been followed by the Secretary of Education's policy interpretation of the EHA that "[the] responsibility to make available a free appropriate public education does not mean that a public educational agency must use only its own funds for that purpose. An agency may use whatever State, local, Federal, and private sources of support areavailable to pay for required services." 45 Fed.Reg. 86,390 (1980) (emphasis added).

Although we should defer to the statutory interpretation of the Department of Education, which administers the EHA, see Irving Indep. School Dist. v. Tatro, 468 U.S. 883, 891-92 , 82 L. Ed. 2d 664 , 104 S. Ct. 3371 (1984), neither the regulation nor the policy interpretation does more than interpret the EHA as permitting states to use available funds from insurers. "Available" funds must be read as limited to funds which the insurers are obligated to provide under the applicable contract. Nothing in the regulation or policy statement requires insurers to commit funds which are not available because they are explicitly excluded [**19] from the contract. n7

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n7 Seals v. Loftis, 614 F. Supp. 302 (E.D.Tenn. 1985), relied on by plaintiffs, held only that parents could be required to seek reimbursement from their insurer if they would incur no costs in doing so, but in no way suggested that insurers are required to cover the costs of services explicitly exempted from coverage. See also Gehman v. Prudential Property and Casualty Ins. Co., 702 F. Supp. 1192 (E.D.Pa. 1989).

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Finally, plaintiffs rely on what they refer to as "policy interpretations." In response to an inquiry from counsel for plaintiffs in this case regarding the validity of the Blue Cross and Blue Shield exclusionary provisions at issue, the Director of the Office of Special Education Programs stated that "the regulations implementing Part B [of the Act] make clear that the EHA was not intended to relieve insurers of obligations that they would otherwise have had EHA not been enacted." U.S. Dept. of Education, Office of Special Educational Programs, Policy Letter (Sept. 29, 1988) Ed. for Handicapped L.Rep. 213:214 (1989). There was a similar response to another inquiry a decade earlier, stating "[the] insurer could not refuse to pay for the services [**20] simply because the State is responsible for providing a free appropriate public education to all handicapped children." U.S. Dept. of Education, State Policy and Admin. Review Branch, Policy Letter (Sept. 29, 1977) Ed. for Handicapped L.Rep. 211:06 (1979). See also id. at 211:103. ("The purpose of [34 C.F.R. @ 300.301] is to allow States to make use of all available resources to provide free appropriate public education for handicapped children, including available insurance proceeds."). These letters cannot support the weight plaintiffs place on them. Like the statute, regulation and policy statement, nothing in these letters states that an insurer cannot contractually exclude coverage for services that are provided free under the Act.

If the administrative interpretation were as broad as plaintiffs claim, we would have to decide whether it departed so markedly from the statutory text, legislative history and policy underlying the statutory scheme that deference would not be due. The Supreme Court's statement that administrative [*815] rulings, interpretations and opinions "'constitute a body of experience and informed judgment to which courts and litigants may properly resort for [**21] guidance'" was tempered by its cautionary note that "'[the] weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'" General Electric Co. v. Gilbert, 429 U.S. 125, 141-42 , 50 L. Ed. 2d 343 , 97 S. Ct. 401 (1976) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 , 89 L. Ed. 124 , 65 S. Ct. 161 (1944)). Because the letters cited by plaintiffs are consistent with, and go no further than, the regulation found at 34 C.F.R. @ 300.301, which we have already held does not support the position advocated by plaintiffs, we need not decide the extent to which they must be accorded deference. n8

- - - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - - -

n8 We note that the administrative interpretation of the regulation in 1978 was similar to that which we give it in the text. Blue Cross and Blue Shield of Iowa had requested an interpretation as to whether the regulation at 45 C.F.R. @ 121a.301(b) (recodified at 34 C.F.R. @ 300.301(b)) nullified provisions in their health contracts excluding coverage for hospital costs which the subscriber was entitled to obtain without cost by complying with any federal, state, or municipal law. The Bureau of Education for the Handicapped responded:

you asked whether Reg. 121a.301(b)[:] (1) nullifies a private insurance contract exclusion prohibiting reimbursement for hospital services which an insuree could obtain without cost by complying with a Federal, State or local law or (2) clarifies that an insurer may still be required to fulfill valid obligations. The second interpretation is correct. . . . Reg. 121a.301(b) was included to make it clear that the public educational agencies did not necessarily have to pay the costs, but could use any available Federal, State, local or private funds, including private insurance benefits.

U.S. Dept. of Education, State Policy and Admin. Review Branch, Policy Letter (Oct. 3, 1978) Ed. for Handicapped L.Rep. 211:76 (1979) (emphasis added).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - -

[**22]

We recognize that there is some tension between an administrative policy that insurers should not be able to use the availability of free services under the EHA to avoid obligations to pay for those services and the provision in the Blue Cross/Blue Shield policy that services which are provided by the government without cost are excluded from coverage. However, we cannot conclude, without clear statutory support, that Congress intended the EHA to abrogate such a provision in a privately negotiated contract. We are confident that Congress would not have done so without explicitly so providing.

Because we are unable to discern a congressional intent to intervene in the contractual relationship between insurers and subscribers, we hold that on the face of the plain terms of the exclusions in the Major Medical policy, Blue Cross/Blue Shield are not liable for the costs of the physical therapy at iss[illegible] in this case.

IV.

Conclusion

For the foregoing reasons, we will affirm the district court's order dismissing the action.

Sparta, New Jersey 0 8 1
201-579-4800

RECEIVED

OCT 3 1991

October 1, 1991

.ent

Dear ~~Mr~~

This letter serves to acknowledge receipt of the Summons and Complaint filed agains the Board of Education as a result of the above referenced incident. Because the Counts naming the Board of Education, · Community Center and School do not include any allegations of deliberate acts, we will be providing a defense for the Board of Education, Community Center and School without any Reservation of Rights, according to the terms of the policy, number MP15932, effective December 15, 1989 through December 15, 1990.

In accordance with your insurance contract, we are referring this case to the law firm › represent your interests.

The above referenced Complaint seeks to recover Punitive Damages. As it has been determined to be against Public Policy to insure against Punitive Damages, we are obliged to advise you that we are unable to provide coverage for that part of this suit. Therefore, it is imperative that you arrange for your own counsel to communicate with our attorney, . ı to arrange coordination of your defense.

While litigation is pending, it is imperative that we be kept advised of your correct current address, as well as your residence and business telephone numbers.

We will be needing numerous materials from your office to properly prepare the defense of this case. I kindly request that you provide a full copy of the employment records of and any and all other records of this incident that you may have on file. Also, please provide the names and addresses of all adults and children who were in attendance on the day of this incident and advise me whether the teachers are still employed by the Board of Education.

[illegible]

December 11, 1991

DEC 16

the general liability insurance carrier for the Board of Education acknowledges receipt of the Summons and Complaint filed in the Superior Court of New Jersey, Law Division, Middlesex County, Docket #L-0823-91 which names you as a defendant. It is our understanding that you were employed by the Board of Education at the time of the incident.

The Complaint seeks to recover punitive damages. Punitive damages are not covered as they are not insurable in the State of New Jersey.

The causes of actions alleged in Count 1, Count 3 and Count 5 are not covered under the terms of the insurance policy. In Counts 1, 3 and 5, it is alleged that your actions were intentional and malicious. Such allegations do not fall within the scope of coverage as they do not meet the definition of "Occurrence." We refer you to the Multi-Peril Policy section to Definitions.

> "Occurrence means and accident, including continuous or repeated exposure to conditions which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."

Without the definition of "Occurrence" being met the insuring clause of the policy is not envoked and therefore there is no coverage under the policy. The insuring clause is quoted below:

> "The Company will pay on behalf of the insured all sums which the insured become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence."

als

There is no occurrence under the policy regarding Counts 1, 3 and 5 and therefore, no coverage.

The remaining allegations that concern you can be found in Counts 2, 4, 6 and 7. Coverage for these allegations is dependent upon a question or fact as to whether or not the allegation of sexual assault alleged to you is substantiated and arises out of negligence.

After reviewing copies of documents from the police and Prosecutor's Office we are compelled to the conclusion that your actions regarding the sexual assault were intentional. Documents from the Prosecutor's Office advises of a guilty plea and conviction of Statute 2C:14-2(b) Sexual Assault in the second degree. Furthermore, your statement to the police acknowledges the fact that your actions were intentional, that you were aware of what you were doing and that you knew that the act was wrongful.

The revelation of these facts cause the allegations of Counts 2, 4, 6 and 7 to also not be covered by reason of the definition of "Occurrence". The fact that your acts have been substantiated as intentional cause the incident to be described as not to be an accident which is necessary for the definition of "Occurrence". Without the definition of "Occurrence" being met, the insuring clause as stated above is not invoked. As there was no coverage for Counts 1, 3 and 5, likewise there is no coverage for Counts 2, 4, 6 and 7 nor for any of the allegations of the Complaint wheresoever found.

The facts of the case would also cause there to be no coverage under any other portion of the policy other than the comprehensive general liability insurance coverage as discussed above.

Under Coverage Form 398 "Public Entity Selected Additional Coverages", the following exclusion applies.

(B) This insurance does not apply:

(2) to personal injury or advertising injury arising out of the wilful violation of a penal statute or ordinance committed by or with the knowledge or consent of the insured.

The facts of the case already indicate a guilty plea and conviction for the violation of penal Statute 2C:14-2(b).

Inasmuch as the plaintiff makes her case against you for damage arising out of bodily injury which includes psychological injury, there is no coverage under Form 14 Board of Education Liability, Including School Board Reimbursement Endorsement. I refer to the Exclusion section of that endorsement.

> "II Exclusions
>
> (b) The Company shall not be liable to make any payment for loss in connection with any claims against the insured:
>
> (2) for any damages, direct or consequential, arising from bodily injury, sickness, disease or death of any person, or for damage to or destruction of any tangible property including loss of use thereof."

In summary, there is no coverage for any of the claims ascerted by [redacted] nor for any of the claims of her parents which arise from the injury to [redacted]

Inasmuch as there is no coverage under the insurance policy, I am returning to you this Summons and Complaint.

It is strongly suggested that you contact your own attorney to defend your interests in this matter.

Very truly yours,

CERTIFIED MAIL RETURN RECEIPT REQUESTED

DEFENDING WHISTLEBLOWER CLAIMS

I. What is a "whistleblower" claim?

A "whistleblower claim" is one in which an employee claims that adverse job action was taken against him or her in retaliation for the employee's threat to reveal (or action in revealing) damaging information about the company or its practices to authorities or to the public. The stereotypical example of a whistleblower claim is where an employee learns that his company is violating EPA regulations by pumping toxic chemicals into the environment; the employee goes to management stating that if they don't change the practice, the employee will inform the EPA. The company does not want to change their practices, so it terminates the employee to "punish" the employee and/or to prevent the employee from having access to a means to prove a legal violation.

To protect such an employee and to encourage whistleblowers, many states have enacted statutes to protect employees who "blow the whistle" on their employer's illegal practices. The terms of these statutes vary from state to state, but they generally prohibit an employer from taking adverse job action (such as termination or demotion) following an employee's threat to reveal sensitive or damaging information to the public or other authorities. Where such adverse job action does occur following an employee's threat or revelation of such information, the statutes provide certain civil remedies for the affected employees. Some states provide similar civil remedies to "whistleblowers" based on various common law theories of wrongful discharge, rather than upon statutory rights and remedies.

Whistleblower's claims, and the publicity surrounding them has, not surprisingly, contributed to a substantial increase in unfounded suits. For example, when an employee is discharged, he or she may file suit seeking the protection accorded a whistleblower under the law of the state in which he or she resides, alleging that the termination was improper because it was in response to a threat to reveal damaging information about the company. Such suits often become even more damaging than a "typical" wrongful discharge case, because the employee's allegations of impropriety often lead to a full scale and expensive investigation of the allegedly improper activities. Thus, a "simple" wrongful termination case may become a complex case, requiring investigation of such things as environmental practices, tax and bookkeeping issues, contract and bid-letting procedures, or other record-keeping practices.

II. How a School Board Can Defend Such Suits

The critical fact that a School Board must establish in defense of a whistleblower claim is that a legitimate reason exists for the adverse job action, and that the legitimate reason was unrelated to any threat (alleged or actual) by the employee to blow a whistle. Such a defense is, of course, substantially aided where the Board's policy generally is to document the reason(s) for adverse job actions. Thus, for example, if an employee alleges (spuriously) that he was discharged because he "became aware" that the Board systematically discriminates against handicapped individuals in its hiring decisions, the Board should present written evidence that the employee's termination was necessitated by a specific reason, such as incompetence. If available, the Board should also introduce evidence of compliance with the law or regulation that is the subject of the whistleblower's challenge.

As in many areas of life, the best defense is a good offense. School Boards should establish a specific written policy to address whistleblower issues. The policy should state first and foremost that the Board's intention and desire is to follow all state, federal and municipal laws and regulations. The policy should put an affirmative obligation on each employee to report any suspected violations to his or her supervisor (or if the supervisor is the party responsible for the offense, to a more senior individual). The policy should make clear that all reports of suspected violations should be in writing (and dated); that all complaints will be investigated; and that a written disposition of each complaint will be made as well as a detailed "paper trail." The policy should further affirmatively provide that no one will be retaliated against for reporting such allegations or complaints, and that the names of those making reports, the reports and the investigations resulting therefrom will be maintained as confidential, to the greatest extent possible. The policy should state that employees who retaliate against those making allegations will be penalized. Finally, the policy should detail an internal "audit" procedure to regularly review whether the Board is in compliance with legal requirements in sensitive areas. Before establishing a new whistleblower policy, a School Board would be well advised to review the policies of other Boards, and indeed the policies of other types of employers.

Once a whistleblower policy is put into place and practice, it should be well publicized. For example, a copy of the policy and the applicable state statute should be posted in conspicuous locations. A copy of the policy should be disseminated in employee handbooks, and the Board may want to consider having employees sign "sign off" sheets acknowledging receipt of the policy. Additionally, the policy can be featured in internal seminars, and discussions on ethics.

Assuming that a whistleblower policy is enforced consistently, the policy itself can often help a School Board defend against unfounded whistleblower claims. For example, if a terminated employee complains that she was discharged in retaliation for threatening to reveal information about certain allegedly illegal practices, her complaint should have been made in writing, pursuant to the policy. If no such written complaint exists, (as it will not, if it is an after-the-fact fabrication), it will be evident that she has not fulfilled her obligations as an employee under the established policy. This showing generally undercuts the "good guy/concerned citizen" image that a whistleblower seeks.

Obviously, to defend whistleblower claims, the Board should carefully review all substantive defenses on the merits. Additionally, the relevant statute of limitations should be considered. Typically a whistleblower claim must be made within a very short period of time following the adverse job action, because Legislatures have recognized that a whistleblower claim is the kind of claim that requires very rapid access to witnesses, documents and other evidence. Therefore, if a disgruntled employee's whistleblower claims were presented untimely, the case may be subject to dismissal.

III. Conclusion

The key to successful defense of whistleblower claims is a well-publicized policy for handling such allegations. The policy must be consistently followed and strictly enforced.

Henry W. Saad
Terry W. Milne

Attached to this outline, as an example of a state whistleblower statute, is the Michigan statute.

1-17-81

STATE OF MICHIGAN
80TH LEGISLATURE
REGULAR SESSION OF 1980

Introduced by Reps. Barcia, Spaniola, Vanek, Ciaramitaro, Alley, Dutko, Rocca, Hasper, Randall, Griffin, Legel, Cropsey, Evans, Jondahl, Conroy, Virgil C. Smith, Harrison, DeBeaussaert, Fitzpatrick, Kirksey, Gnodtke, Cramton, Bullard, Dongvillo, Burkhalter, Trim, Dodak, Allbritten, Henry, Vaughn, Clodfelter, Hollister, Tomboulian and Bennane

ENROLLED HOUSE BILL No. 5089

AN ACT to provide protection to employees who report a violation or suspected violation of state, local, or federal law; to provide protection to employees who participate in hearings, investigations, legislative inquiries, or court actions; and to prescribe remedies and penalties.

The People of the State of Michigan enact:

Sec. 1. As used in this act:

(a) "Employee" means a person who performs a service for wages or other remuneration under a contract of hire, written or oral, express or implied. Employee includes a person employed by the state or a political subdivision of the state except state classified civil service.

(b) "Employer" means a person who has 1 or more employees. Employer includes an agent of an employer and the state or a political subdivision of the state.

(c) "Person" means an individual, sole proprietorship, partnership, corporation, association, or any other legal entity.

(d) "Public body" means all of the following:

(*i*) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of state government.

(*ii*) An agency, board, commission, council, member, or employee of the legislative branch of state government.

(*iii*) A county, city, township, village, intercounty, intercity, or regional governing body, a council, school district, special district, or municipal corporation, or a board, department, commission, council, agency, or any member or employee thereof.

(*iv*) Any other body which is created by state or local authority or which is primarily funded by or through state or local authority, or any member or employee of that body.

(*v*) A law enforcement agency or any member or employee of a law enforcement agency.

(*vi*) The judiciary and any member or employee of the judiciary.

Sec. 2. An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

(293)

Sec. 3. (1) A person who alleges a violation of this act may bring a civil action for appropriate injunctive relief, or actual damages, or both within 90 days after the occurrence of the alleged violation of this act.

(2) An action commenced pursuant to subsection (1) may be brought in the circuit court for the county where the alleged violation occurred, the county where the complainant resides, or the county where the person against whom the civil complaint is filed resides or has their principal place of business.

(3) As used in subsection (1), "damages" means damages for injury or loss caused by each violation of this act, including reasonable attorney fees.

(4) An employee shall show by clear and convincing evidence that they or a person acting on their behalf was about to report, verbally or in writing, a violation or a suspected violation of a law of this state, a political subdivision of this state, or the United States to a public body.

Sec. 4. A court, in rendering a judgment in an action brought pursuant to this act, shall order, as the court considers appropriate, reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages, or any combination of these remedies. A court may also award the complainant all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, if the court determines that the award is appropriate.

Sec. 5. (1) A person who violates this act shall be liable for a civil fine of not more than $500.00.

(2) A civil fine which is ordered pursuant to this act shall be submitted to the state treasurer for deposit in the general fund.

Sec. 6. This act shall not be construed to diminish or impair the rights of a person under any collective bargaining agreement.

Sec. 7. This act shall not be construed to require an employer to compensate an employee for participation in an investigation, hearing or inquiry held by a public body in accordance with section 2 of this act.

Sec. 8. An employer shall post notices and use other appropriate means to keep his or her employees informed of their protections and obligations under this act.

Sec. 9. This act shall be known and may be cited as "the whistleblowers' protection act".

T. Thos. Thatcher

Clerk of the House of Representatives.

William C. Kandler

Secretary of the Senate.

Approved ....

....

Governor.

DEALING WITH THE PRESS ON LITIGATION

MARTIN SEMPLE, ESQ.
Semple & Jackson, P.C.
1120 Lincoln Street, Suite 1300
Denver, Colorado 80203
(303)595-0941

NSBA Legal Seminar
Keystone,Colorado
February 6-7, 1992

Press relations in litigation is a type of crisis public relations. If a school district is sued, especially in a high profile civil rights action, and more so if the case involves some wrongdoing by a teacher such as sexual misconduct with students or termination of an employee, a district is involved in "managing" bad news. The allegations in the complaint, regardless of their truth, are a reflection on your client.

While the natural reaction is to say "no comment," if someone does not comment on behalf of the school district, the only comments that will be quoted in the media are the comments which are favorable to the plaintiff. For that reason, some comment or press release of some description is absolutely crucial. Being ready and having a plan to deal with the public relations element of high profile litigation, which is essentially all litigation involving a school district, is the necessary part of the defense.

The author wishes to acknowledge assistance in developing this article from Floyd Ciruli, Esq., Ciruli & Associates, Denver, Colorado, polling and media consultants.

One advantage one normally has in a litigation setting is that the filing of a lawsuit can generally be anticipated. The factual scenario giving rise to the lawsuit has probably arisen long before the suit has been filed, and the publicity attendant to the filing of the suit should have been anticipated and a plan developed at that point. Some general ground rules suggested by public relations people are as follows:

1) There should be one spokesperson. Normally, in civil litigation, it should not be a lawyer since the reality is that the image of attorneys is not positive. Additionally, there are the rules under the Code of Professional Responsibility and ABA Model Rules which need to be considered and which limit the comments that can be made. You may need outside professional assistance in dealing with the press. A media consultant is not inappropriate, and may be essential in a high profile case.

2) All news releases and statements should be cleared with the lead attorney for the district; there are legal issues involved and need legal expertise. The attorney directly briefs the spokesperson.

3) Alert all individuals who may be contacted or who may get telephone calls, such as secretaries or assistants to the superintendent, to funnel all requests for information to the designated spokesperson and not to speculate on their own version of the situation.

4) "No comment" simply biases the reporter against one's position. Saying "no comment" simply makes you or your client look guilty. Instead, there needs to be an explanation about why a comment cannot be made. For example, you are still reviewing the motion, or the situation needs full investigation.

5) There is a dynamic involved in litigation, and generally one news release will not be sufficient; you need to be able to at least respond to the inquiries of reporters while they are interested in the story. The "story" tends to have a life of its own and very often is short lived. In litigation these are natural "highs;" when it is filed; answer; hearings and significant motions.

6) When motions are filed, be ready to have your spokesperson comment on the motions or issue a news release explaining the motion, summarizing the argument,

7) Off the record comments are generally not helpful, but making an attorney available for comments with regard to process and some background information for the press can be useful.

8) When "no comment" is appropriate: The parties to the lawsuit and witnesses should be cautioned not to make any comment since "what they say may and will be used in evidence against them." If they are quoted in the newspaper, it is quite likely that those quotations will be effectively used in cross examination. If they are misquoted, then their failure to write a letter to the

editor or take some action to correct the misquotation is simply going to underscore their problem. The problem can be avoided by clearly stating that they have been directed by their attorney not to comment. The dilemma for public officials who do not wish to comment is resolved by having a spokesperson take care of the situation, or having a prepared statement without answering questions. This area needs to be thoroughly covered before the litigation is filed.

9) Be ready to deal with negative results. If the judge rules against your client on key preliminary issues, you have to be ready with an appropriate comment or news release in response to that. Similarly, in representing a public entity, you have to anticipate the need for comment on the final decision, especially if the judgment goes against you.

10) In an especially sensitive case (sexual abuse of student; sexual harassment) you need to distinguish between the legal basis for dismissal and the private and personal considerations for the victims. The court decisions take pains to deal with this, and the district's spokesperson must do the same.

11) It is extremely important that a lawyer not be promotional in either dealing with the press or in press releases or media interview.

Ethical Considerations

The Code of Professional Responsibility has a series of rules prohibiting an attorney from commenting on "the evidence regarding the occurrence or transaction involved, the character, credibility, or criminal record of a party, witness or prospective witness, the attorney's opinions as to the merits of the claims or defenses of the party or any other matter reasonably likely to interfere with a fair trial of the action." DR 7-107(G) A similar type of rule is contained in the ABA Model Rules, Rule 3.6(b).

In reality, these rules are more honored in the breach than in the observance. There is a recognition that the rules may very well be at odds with the right of free expression, and, when one observes the type of publicity surrounding the Kennedy-Smith trial and the statements made by prosecutors and defense attorneys, dealing with the press and making some types of statements with regard to the trial, including the merits of the case, is inevitable. Just as important are the United States Supreme Court cases which held that a total ban on advertising by private attorneys, Bates v. State Bar of Arizona, 433 U.S. 350 (1977), and a ban on lawyer direct mail solicitation, Shapiro v. Kentucky Bar Association, 486 U.S. 466 (1988), violate First and Fourteenth Amendment rights of the attorneys.

TV and Cameras in the Courtroom

The determination on whether TV or still cameras will be allowed into a courtroom is usually up to the judge and is controlled in most states by the Code of Judicial Conduct. Rule 121, Sec. 1-7, of the Colorado Rules of Civil Procedure specify that the photographing, broadcasting, televising, or recording of court proceedings in the courtroom shall be governed in accordance with Canon 3 of the Code of Judicial Conduct of the State of Colorado. Colorado Code of Judicial Conduct, Canon 3, Rule (8). "A judge may authorize expanded media coverage of court proceedings... " and then spells out the guidelines. The rule provides for any party or witness lodging a written objection with the judge to the expanded media coverage of all or a portion of the proceeding, and the party may seek review of the ruling by original proceeding or by post-trial appeal.

If televising of a courtroom proceeding is a possibility or if the media requests such authorization, the attorney has to balance the assessment of any infringement on a "fair trial" for his client and the obvious problem of objecting to televising a trial that involves a taxpayer supported public entity.

DAVID B. RUBIN, ESQ.

DUE PROCESS HEARINGS UNDER THE I.D.E.A.

- I. **ORIENTATION OF CLIENT**
  - A. Conduct In-Service
  - B. Establish "Hot Line"
  - C. Emphasize Procedural Regularity
- II. **PREHEARING PREPARATION**
  - A. Participate at Mediation Stage
  - B. Develop Alternatives/Settlement Proposals
  - C. Rectify Procedural Errors Promptly
  - D. Prepare Witnesses/Organize Exhibits
- III. **THE HEARING - PROCEDURAL ISSUES**
  - A. Burden of Going Forward
  - B. Burden of Persuasion
- IV. **THE HEARING - SUBSTANTIVE ISSUES/EVIDENCE**
  - A. Proving "Appropriateness"
  - B. Present "Day in the Life"
    - 1. Produce actual instructors
    - 2. Introduce redacted data on classmates
    - 3. Consider videotape
  - C. Role of Parental Hostility/Impulsiveness
  - D. The "Home Conditions" Case
  - E. Residential Placement
  - F. Equitable Apportionment
  - G. Conformance of Private School to State Standards

Board of Education of Community Consolidated School Dist. No. 21 v. Illinois State Board of Education, 938 F.2d 712 (7th Cir. 1991)

Johnson v. Independent School Dist. No. 4, 921 F.2d 1022 (10th Cir. 1990)

Hiller v. Board of Education, 743 F. Supp. 958 (N.D.N.Y 1990)

Doyle v. Arlington County School Board, No. 90-2427 (4th Cir. 1991) (1991 U.S. App. LEXIS 29587)

The Binghamton City School Dist. v. Borgna, No. 90-CV-1360 (N.D.N.Y. 1991) (1991 U.S. Dist. LEXIS 2565)

Lascari v. Board of Educ., 116 N.J. 30, 560 A.2d 1180 (1989)

Spielberg v. Henrico County Public Schools, 853 F.2d 256 (4th Cir. 1988), cert. den. 489 U.S. 1016 (1989)

Ash v. Lake Oswego School Dist. No. 7J, 766 F. Supp. 852 (D. Ore. 1991)

Roland M. v. The Concord School Committee, 910 F.2d 983 (1st Cir. 1990), cert. den. 111 S. Ct. 1122 (1991)

Norton School Committee v. Massachusetts Dept. of Education, 768 F. Supp. 900 (D. Mass. 1991)

Johnson v. Lancaster Lebanon Intermediate Unit 13, 757 F. Supp. 606 (E.D. Pa. 1991)

SPECIAL EDUCATION LITIGATION: THE PREPARATION & TRIAL

John P. Heil
Baird, Holm, McEachen,
Pedersen, Hamann & Strashiem
Omaha, Nebraska

INTRODUCTION

This article addresses the practical aspects of representing a school district in special education litigation. It is important to approach these cases with an understanding of the sympathy that a hearing officer or judge naturally has for the parents of a handicapped child who may never fulfill even the most basic parental expectations. Often the parents are under-going an extended grieving process which may be manifested, in part, through the litigation.

The challenge for school attorneys is to portray their clients sympathetically by demonstrating the extraordinary difficulty which a serious handicap poses to the educational process as well as the considerable talent and substantial resources which the school has brought to bear on the problem.

The hearing or trial should function as a mini-seminar to help the judge or hearing officer comprehend the implications of the handicapping condition for the child and the school. By avoiding a "poor boy" approach and by advocating for the handicapped child, it is possible to wear the "white hat" in special education litigation.

DOCUMENTARY EVIDENCE

The first step in preparing for special education litigation is to promptly assemble and review every document in the school district's records pertaining to the handicapped student. Some records, such as reports of evaluations and Individual Education Plans, (IEPs), have obvious significance to the case, but crucial information is often found in other documents which are easily overlooked. Attendance records, for example, may disclose a pattern or accumulation of absences which would interfere with any child's educational performance, whether or not the child was handicapped. The student's health or nursing records may disclose illnesses, medications or other physical conditions such as ear infections or vision problems not mentioned in the IEP or multidisciplinary evaluations but which may have a considerable impact on the child's ability to benefit from his or her educational program.

Other records of importance in the school's files are correspondence and records of telephone calls to and from the parents. These documents often show the considerable effort undertaken by school personnel to respond to parental concerns as well as the parents' manner of dealing with the child's problems and of responding to the concerns of the school's staff about the child. At minimum, these records can undermine opposing counsel's attempts to make the complaining parents appear to be the "victims" of a heavy-handed and uncaring school bureaucracy.

Samples of the student's papers may also be contained in the school records. These are helpful to a hearing officer or judge in understanding the nature of the limitations imposed by the child's handicap, and they demonstrate the earnest efforts by school staff to address the child's deficiencies. Representative samples of school papers also may illustrate the child's progress over the course of one or more school years thereby defusing claims of regression or lack of educational benefit.

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The review of the assembled documents should be conducted jointly by the school's attorney and a knowledgeable staff member who can explain each document's origin and significance.

The documents can then be arranged in chronological order, tabbed, indexed and copied for an exhibit binder. Pages within tabs can be numbered for easy reference. An appropriate evidentiary stipulation is then prepared and submitted to opposing counsel with a copy of the exhibit binder. If the exhibit binder contains all of the school's records regarding the handicapped child, opposing counsel normally will forgo an examination of the school's records that can be time-consuming and disruptive for the staff.

There is, obviously, a danger that preparation of the complete exhibit binder will operate to the disadvantage of the school by disclosing procedural deficiencies which otherwise may have been overlooked by opposing counsel. This disadvantage is outweighed, however, by the convenience of having a single, comprehensive exhibit binder for use in preparing witnesses and for reference at the hearing or trial. As previously noted, items in the student's records which seem insignificant at the outset of the case often become important later as new issues develop in the proceedings. It is also likely that opposing counsel would conduct a diligent review of all of the student's records and discover any procedural deficiencies even if the exhibit binder were not produced. Finally, the school attorney can avoid surprise at the hearing or trial if he or she has mastered the entire record and is prepared to address any procedural claims or other alleged deficiencies.

Extra copies of the exhibit binder should be prepared to allow the school's witnesses to refresh their recollection and prepare for the hearing. Outside expert witnesses also benefit by having a copy of the exhibit binder for review well in advance of the hearing. The original records remain in the school's files and are available on a daily basis to the staff serving the handicapped student during the pendency of the proceedings.

DEMONSTRATIVE EVIDENCE

The old adage that "a picture is worth a thousand words" is particularly applicable in special education litigation. Hours of testimony by expert evaluators, teachers, therapists or parents do not provide the same understanding about the child and his or her educational program that is obtained through observing the child in his or her classroom setting even if only for a few minutes. Since it is usually impractical to take the hearing officer or judge to the classroom, a video recording can be used to substitute for first hand observation. Whenever a special education dispute is on the horizon, schools should make it a practice to videotape the student in the classroom setting if such taping is not regularly conducted to evaluate the instructional program. The videotape can be authen-ticated at the hearing or trial by the person who operated the camera or, preferably, by the teacher or therapist whose instruction was recorded.

Given the limited patience of most hearing officers and judges, a good practice is to offer two tapes into evidence. The first is an unedited tape consisting of several instructional sessions lasting up to fifteen or twenty minutes each. The second is an edited tape consisting of selected segments from the first tape but having a total duration of no more than ten to fifteen minutes. The second tape is played at the hearing or trial during the testimony of the teachers or therapists shown on the tape who explain what is taking place. The unedited tape is available to show what was edited, but usually is not played. It also may be possible to duplicate both tapes on a single cassette, with the edited version appearing first.

Videotape evidence is particularly critical if the parent obtains expert witnesses who seek to create an unrealistic picture of the child or who attempt to belittle the school program's efforts to educate the student. A videotape also helps a hearing officer or judge to comprehend the extraordinary difficulty inherent in educating a child with one or more serious handicapping conditions. The videotape is often the most influential exhibit in special education litigation. The importance of videotape exhibits to school district defendants is illustrated by the fact that they are rarely offered in support of the parents' case.

WITNESS SELECTION AND PREPARATION

The selection of witnesses to testify on behalf of the school district depends, of course, on the issues raised by the complaint. Because parties at due process hearings are not strictly limited by their pleadings, the focus of the attack will often change as the facts develop through the course of such hearings. Thus, it is best to prepare for all eventualities in selecting hearing witnesses.

Classroom Teacher or Therapist

Just as the videotape of the child in his or her educational setting is usually a key exhibit, the classroom teacher or therapist is often the most important witness presented on behalf of a school district defending its placement or IEP. Among the witnesses available to the school, the classroom teacher or therapist is the most familiar with the child and demonstrably has the child's best interest at heart. Moreover, cross-examination of a classroom teacher or therapist usually is not searing.

Hearing officers and judges tend, though not expressly, to base their decision on whether they would want their own child, if similarly handicapped, to be educated by the classroom teacher or therapist who has testified. Procedural issues such as proper identification, least restrictive environment, or the measurability of IEP objectives, become far less significant if the hearing officer or judge has confidence in the ability of the teacher or therapist to provide a program that will benefit the child. Even if the teacher or therapist has not seen the child and is merely part of a disputed placement proposal, this testimony remains a critical part of the school district's case.

Other School Staff

Additional witnesses for the school may include staff or outside evaluators, consultants, supervisors and administrators who have participated in the multi-disciplinary evaluation process, IEP meetings, the placement process or who have observed and supervised the provision of special education and related services to the pupil. Consideration should also be given to use of educators who serve the student in "mainstream" classes or who observe the student and his or her interaction with other students at the school. These staff members share the enthusiasm and concern of the special education teacher or therapist for the handicapped child, and it is important to convey the atmosphere of the entire school to the hearing officer or judge.

In selecting witnesses from the school staff, there frequently will be some overlap of knowledge or experience with the handicapped student. For example, the child may be served by several special education teachers, therapists or "mainstream" teachers, or the child may have been tested by several psychologists. Such overlaps provide the school attorney with an opportunity to select the witnesses who will be the most effective on the witness stand in "selling" their school and program or in articulating their evaluative findings and recommendations.

Assuming a prospective school witness has a good reputation for being articulate and is impressive in an individual interview with the school's attorney, it is not uncommon for such persons to lose all confidence when confronted with a hearing or trial situation. Similarly, witnesses who are very reticent or reluctant during an initial interview with the school's counsel can become extremely articulate and effective witnesses at the hearing or trial. Experience has shown that the effectiveness of a school witness usually is related directly to the nature and amount of preparation of the witness prior to the hearing or trial.

Initial Witness Meeting

Most school personnel have never testified in any kind of hearing or litigation, much less a special education case.

Moreover, they are accustomed to resolution of educational disputes through consensus in staff meetings, not through an adversary system. Thus, the first step in witness preparation is to conduct a group meeting with the staff members likely to testify on behalf of the school district as well as those who potentially may be called by the opposing party.

It is essential that the school administrator responsible for the case call this meeting and be present. The preparation of and participation in the defense of a special education case will entail substantial stress and toil. The staff must understand the expectations placed upon them, the importance of the case to the child and the school district, and that the attorney's presentation represents the position of the school district.

The staff should be briefed on the hearing or trial process in general and provided with a witness brochure generally applicable to trial proceedings. In addition to the usual admonitions, there are several points rather unique to special education litigation that should be presented to the staff witnesses as a group.

The first and the most important point is that the school staff members are not "on trial" in the proceedings. The special education proceeding is not a malpractice trial, and there will be no finding of fault or neglect. The purpose of the hearing or trial is to determine what is in the best educational interest of the handicapped child. Since the school and the parents are at loggerheads, it is the role of the hearing officer or judge to resolve the dispute. The ultimate winner or loser in this case is the child, since it is his or her educational program that will be effected by any ruling. While being called to testify under oath and being subjected to cross-examination may not be anyone's favorite pastime, it is the staff's duty to testify to help protect the child's educational interest.

The second point is that they are the experts on the educational issues and that they know far more about these matters than the parents, the attorneys, the hearing officer or the judge. Their role is to explain how their expertise has been applied to meeting the educational needs of the handicapped child. Since the hearing officer or judge is a "lay" person or "consumer" with respect to education, they must testify in nontechnical terms as much as possible, use repetition and concrete examples, and otherwise respond to questions as if they were being asked by a student's parent, not a curriculum supervisor or a college professor. A corollary to this proposition is that the witness should make no assumptions regarding questions incorporating educational terms of art. An example would be the term "regression." If a questioner uses such terms, the witness may ask how the questioner defines the term.

The third point relates to the role of the parent's attorney. The school's witnesses should understand that the opposing attorney will advocate the parental point of view, whether or not that is in the best interest of the child, because the parents are the attorney's clients. In all likelihood the opposing counsel has spent little if any time with the handicapped child and knows only what he or she has been told by the parents or their experts. Given this role, the school's witnesses should neither be surprised by the questions asked nor influenced by opposing counsel's reactions to their answers (which may take the form of encouragement, sarcasm, disbelief, mirth or sorrow), anymore than they would react to such histrionics on the part of a parent.

The fourth point to convey to the school witnesses is that how they respond is just as important as what they say while they are on the witness stand. They should focus on being attentive, providing thoughtful and direct responses, and on avoiding defensiveness. While they are the experts in educational matters, any righteous indignation may be perceived as arrogance or callousness. It is important, however, that they take pride in and show enthusiasm for their program and school without being boastful.

Individual Witness Interview

After meeting with the school's witnesses as a group, it is important to meet with each witness individually to review the witness' knowledge and personal view of the matter, to refresh recollection through the exhibits, to provide the questions to be asked on direct examination and those that are anticipated to be asked on cross-examination, and to address any individual concerns or apprehensions the witness may have. The school's attorney must be alert for any express or implied disagreement of the witness with the position taken by the school district and for any communication of such disagreement with the parents or their counsel. Alternatively, the witness may have a long-standing disagreement with the parents which could impact on the witness' credibility.

The witness should be reminded that any personal notes taken to the witness stand are subject to examination by the opposing counsel and the student's parents, even though they would not ordinarily be able to obtain access to those records. The witness should also be reminded that it is perfectly proper to discuss his or her testimony in advance of the hearing with the school's counsel and other school staff members. The witness should not hesitate to admit such discussions if asked on cross-examination.

If the witness will be testifying about an evaluation or assessment of the handicapped child, the witness should be directed to review the entire exhibit book of school records. Evaluation or assessment witnesses should be forewarned that if their testimony is critical to the school district's position in the case, opposing counsel will probably attempt to characterize the evaluator as inept, biased, incompetent or arrogant so as to damage his or her credibility. The witness should be prepared to respond to questions alleging that the child was ill, under medication, not wearing his or her glasses, had an ear infection or otherwise was not up to par on the day of the observation or testing. Other questions typically put to evaluation and assessment witnesses on cross-examination relate to the justification for selection of the test instruments, whether or not the test instruments have been standardized on a handicapped population, and the meaning of various test scores which, to a lay observer, may suggest a conclusion different than that offered by the witness. The witness should familiarize the school attorney with the strengths as well as the weaknesses of the evaluative process.

If the witness is a teacher or therapist who has not previously served the student, but is proposed to serve the student, the witness should, if possible, have an opportunity to observe the student. This observation and a careful review of the documentary and demonstrative evidence available should assist the witness in testifying with assurance about how he or she would serve the handicapped child if the student attended the proposed program.

Outside Expert Witnesses

An impartial and incisive analysis of the educational issues by an outside expert witness may serve an important purpose in the presentation of the school district's case. Selection factors (in order of importance) include:

(1) extensive experience with the particular handicap or educational problem presented in the case;
(2) the ability to take a completely objective posture;
(3) the ability to provide an unembellished analysis of the child's handicapping condition and educational needs in very concrete terms;
(4) professional recognition within the witness' field; and
(5) prior experience as an expert witness.

While the holding of the most advanced degree available from a prestigious institution and the authorship of numerous articles or publications may be of interest to educators, hearing officers or judges are far more attentive to expert witnesses who provide an understandable explanation of the handicapping condition or education methodology that is at issue in the case. Whether such an outside expert is found at a nearby institution or comes from a distant locale is important only in calculating the travel expense.

An outside expert witness is particularly helpful when a school district is attempting to return a student from a contracted setting to its own program or refusing to pay for a parent-selected private placement. The expert can demystify the program offered at the contractual or private setting and provide assurance to the hearing officer or judge that the school district's proposed program will meet the needs of the handi-capped child. Similarly, the outside expert can be helpful if the central issue relates to projecting what may or may not happen if changes are made to the student's placement or IEP resulting in a reduction of services or if the school district refuses to carry out the parent's request for increased services. The outside expert can rely on his or her experience or on published research studies of handicapped children under similar circumstances to substantiate his or her opinions. An incidental but important benefit from using an outside expert is the assistance he or she can provide to the school's attorney in providing searching questions for cross-examination of the parent's expert witnesses to probe underlying assumptions about the child or the educational setting which may not be valid.

If there is a decision to bring in an outside expert, that person should be provided with the exhibit binder and the videotapes well in advance of the hearing. In addition, the outside expert should be brought in prior to the hearing to conduct an unannounced observation of the handicapped child in the classroom setting, afforded the opportunity to converse with the child's teachers, therapists and any classroom paraprofessionals, and taken to visit any educational program proposed for the child. These observational experiences are just as important for the outside expert as they are for the hearing officer.

If possible, the outside expert should be present for the testimony of all of the witnesses to the point at which he or she testifies in the hearing or trial so that the expert's testimony is based not only on the expert's review of the exhibits and observation of the pupil, but also on all of the testimony provided at the hearing. This also allows the expert the benefit of hearing the questions propounded by the opposing counsel and the hearing officer or judge, and he or she is better prepared to address the specific concerns revealed by such questions.

HEARING OR TRIAL STRATEGY

School districts are typically respondents or defendants in special education litigation and thus do not have the burden of going forward. In certain cases—particularly those in which the parent is challenging a change proposed by the school district—there are advantages to assuming the burden of going forward. It is natural for the judge or hearing officer to expect to hear the evidence supporting the proposed change first, and the hearing tends to run more smoothly. This strategy also allows the school district to gain the benefit of the first impression and permits greater emphasis to be placed on the factors or witnesses the school district believes to be determinative of the issues. A drawback to this strategy is that it tends to shift the burden of proof to the school district, but this shift is likely to occur (if only subconsciously) in any event if it is the school district that has proposed the change.

In cases in which the parents are mounting a broadside attack on the school district's program in order to achieve some change, it may not be advisable to assume the burden of going forward on behalf of the school district. Often the issues have not been clearly defined prior to the hearing, especially if no discovery is available. A coherent response to the parents' case may not be possible until all of their evidence has been presented. It is also important to maintain the burden of proof on the parents in such cases.

The school district's case should be presented in a manner that paints a picture of the precise nature and severity of the child's handicaps, the unusual difficulties these handicaps pose for educators, and of the considerable talent and extensive resources that make up the child's educational program.

It is beneficial to elicit a brief summary of the pertinent education, certification, experience and other credentials from each school district witness even if the witness' vita is r ceived into evidence and the opposing counsel is willing to stipulate that the witness is an expert. This short recitation often helps to build the witness' confidence and focuses the fact-finder's attention on the credentials which make the witness' testimony particularly helpful in the case.

If the case is a broadside attack on the program offered by the school district, it may be appropriate to open with the teachers or therapists who serve the child, followed by the other staff members including diagnostic and evaluative personnel who serve to confirm the teacher or therapist's testimony and the educational benefit being provided to the student. In instances involving disputes over changes proposed by the school district, it is usually helpful to begin with the testimony of the diagnostic or evaluative personnel. These witnesses should detail their testing and observation of the student, their finding, and their recommendations as they relate to the IEP, the placement, the educational methodology to be used and what the parents can do to help. The diagnostic or evaluative experts are followed by the classroo teachers and therapists who have served th child or who will implement the IEP and by the other school personnel who can testify as to observation of the student and the student's program.

If an outside expert witness is being used, this testimony is usually most beneficial close to the end of the school district's case-in-chief. The school attorney should not hesitate to solicit the outside expert's recommendations for improvements in the school's program or services for the student. The school district, of course, must be prepared to implement such recommendations, but they serve the important purpose of supporting the objectivity and independence of the outside expert.

In cross-examining the parent's expert witnesses, the school attorney should look for a lack of credentials, opinions beyond the areas of the witness' competence, and "windowdressing" of the child's ability, skills or potential or of the benefits or content of a desired educational placement at another institution. Expert witnesses for parents often testify or infer that education occurs only in the classroom or only at the han of professional teachers or therapists. Since t child is typically "delayed" in his or her learning, it may be suggested that the intensive attention of teachers or therapists is necessary for virtually 24 hours-a-day, 365 days-a- year, in order to "regain" lost ground.

In fact, education neither begins nor ends at the classroom door, and there are limitations on the effectiveness of continuous instruction. The school witnesses and any outside expert should be able to provide testimony concerning the amount of learning which occurs outside the classroom and the importance of the divergent experiences available to the student when school is not in session. The testimony of the school staff should show numerous attempts to advise and assist the parents in providing educationally important experiences outside of school. The school's witnesses should also be able to testify that the best education occurs for all students when school and parents work together. The child suffers only when either the parents or the school drop the ball.

CONCLUSION

The school's evidence should demonstrate how the staff has advocated for the handicapped student both in school and at home. This advocacy is manifested through the earnest testimony of the teacher or therapist as well as through an exhibit binder containing numerous letters, memos and reports to the parents relating to the child's educational program, homework, therapy and health needs. Such evidence demonstrating the staff's efforts to make the parents part of the educational process should place aggressive parents on the defensive and deny them the opportunity of depicting the school as a heavy-handed and uncaring bureaucracy.

3RD CASE of Level 1 printed in FULL format.

DAVID HILLER, a Handicapped child by his Parents and Natural
Guardians ROBERT HILLER and NANCY HILLER, Plaintiff, v.
BOARD OF EDUCATION OF THE BRUNSWICK CENTRAL SCHOOL DISTRICT,
Defendant

No. 87-CV-1141

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
NEW YORK

743 F. Supp. 958; 1990 U.S. Dist. LEXIS 9956

July 31, 1990, Decided
August 2, 1990, Filed

COUNSEL: [**1]

COOPER ERVING SAVAGE, NOLAN & HELLER, Attorneys for Plaintiff, Albany, New York, ROBERT G. WAKEMAN, ESQ.

WHITEMAN OSTERMAN & HANNA, Attorneys for Defendant Board of Education of Brunswick School District, Albany, New York, MELVIN H. OSTERMAN, ESQ., KENNETH S. RITZENBERG, ESQ., JONATHAN WOOD, ESQ.

HON. ROBERT ABRAMS, Attorney General of the State of New York, Attorney for Defendant Thomas Sobol, Albany, New York, LAWRENCE L. DOOLITTLE, Assistant Attorney General.

JUDGES: Neal P. McCurn, Chief United States District Judge.

OPINIONBY: McCURN

OPINION: [*960] MEMORANDUM-DECISION AND ORDER

NEAL P. McCURN, CHIEF UNITED STATES DISTRICT JUDGE

Plaintiff David Hiller ("David"), by his parents Robert Hiller ("Mr. Hiller") and Nancy Hiller ("Mrs. Hiller"), brings this action pursuant to the Education for All Handicapped Children Act ("EAHCA" or "Act"), 20 U.S.C. @ 1400 et seq., alleging that plaintiff is a handicapped child who was denied a free, appropriate education while a student at the defendant Brunswick Central School District ("Brunswick" or "Brittonkill"). Plaintiff seeks a declaration from this court stating that he is a handicapped child within the meaning of the Act; as well as $ 15,228.00 plus interest in monetary relief, which amount includes a demand for $ 10,000 in punitive [**2] damages against the defendant. Brunswick claims that David has never been a child with a handicapping condition, and that even had he been so handicapped, the education plaintiff received, and the services the defendant provided David during his attendance at Brunswick comported with the requirements of the EAHCA. For the reasons stated below, this court finds that (1) David was not a child with a handicapping condition during the 1985-86 or 1987-1988 school years, and (2) the education and services provided by the defendant to the plaintiff during the academic year 1986-1987 satisfied the requirements of the EAHCA. This matter was tried to the court without a jury from February 28, 1990 to March 6, 1990. Pursuant to Rule

Fed.R.Civ.P. the court makes the following:

Findings of Fact

David entered the defendant's school system as a fifth grade student in September of 1985 after he and his parents moved from Albany, New York into the Brunswick school district. At the time of this transfer, Brunswick received academic and other records from David's prior school, records which gave no indication that the plaintiff ever suffered from any physical or learning disability or any handicapping [**3] condition.

Towards the end of September, David's fifth grade teacher, Hope Davis ("Davis") noticed that the plaintiff was experiencing problems with handwriting, organization, attention and following directions; therefore she arranged to meet with Mrs. Hiller to discuss Davis' concerns about the plaintiff. After this meeting, Davis referred the plaintiff to the school district's Child Study Team ("CST") in an attempt to ascertain the cause of plaintiff's learning problems. n1 At the time she filled out the CST referral form, Davis did not believe David had a learning disability, but, at the request of Mrs. Hiller, Davis asked the CST to determine whether the plaintiff was suffering from a learning disability, and if so [*961] what remedial actions Brunswick should undertake. n2

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n1 A CST is a group comprised of various professionals in the Brunswick hool system whose purpose is to assist teachers in dealing with the problems t an individual student with a learning problem may be experiencing. Brunswick's CST is composed of the school's psychologist, the building principal, a speech and language therapist and a school nurse. [**4]

n2 This referral form is reproduced in joint exhibit ("Jt. Ex.") A-1.

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On October 9th, 11th, and 15th of 1985, the Chairperson of the CST Debra Marcal ("Marcal"), Brunswick's psychologist, with the consent of Mrs. Hiller, performed various tests on David which tested plaintiff's intelligence, achievement, and visual-motor integration skills.

On the Wechsler Intelligence Scales for Children - Revised ("WISC-R") test, David achieved a verbal score of 119, a performance score of 102, and a full scale IQ of 112. These test results indicated that David had high average functioning skills, above average verbal abilities, and average spacial abilities. Marcal testified at trial that David's IQ, based upon his WISC-R score, was high average. When given the Peabody Individual Achievement Test ("PIAT"), David performed at or above his current grade level in all areas but spelling, where he was functioning at a level one year below his fellow classmates. n3 His performance on the Visual Motor Integration Test ("VMI") was four years below his grade level, with his problems resulting from his weak attention [**5] span and difficulties in copying from the blackboard to his own paper. n4 David also successfully completed the test of written language OWL"), which measures an individual's handwriting skills as well as their overall abilities to compose an essay. His handwriting appeared to be legible and was similar to that of an average seventh grader. n5

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n3 See Jt. Ex. A-2, p. 2.

n4 Id., p. 3.

n5 Id., p. 2.

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At the conclusion of this battery of tests, Marcal noted that David:

Is a 5th grade boy of high average intelligence and average achievement in school. His performance of those skills that he possesses is sometimes hindered, however, by his poor attention spans and weak copying skills. n6

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n6 See the "Summary and Recommendations" section of Marcal's report following these October tests, located in Jt. Ex. A-2.

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While Marcal did [**6] not find David to be a learning disabled child, she did note that he had some learning problems which might be improved by modifications to his current classroom programs. n7 In response to Marcal's suggestions, David's fifth grade teacher implemented a remedial program for David designed to strengthen those areas in which plaintiff was academically weak. n8

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n7 Id.

n8 At no time during the remainder of this semester did Mrs. Hiller claim that the tests performed on her son were inappropriate or inadequate, or that the modifications to David's classroom programs were failing to meet David's needs.

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Approximately four months after Brittonkill's evaluation of David, Mrs. Hiller privately arranged to have her son evaluated by a team of professionals at the Boston Children's Hospital ("BCH"). After this evaluation, David's mother notified Brittonkill about the study and requested that she be given an opportunity, prior to receiving its written report, to orally inform Brunswick personnel about the results of the [**7] BCH study. The defendant granted Mrs. Hiller's request, and met with her on February 14, 1986. While at this meeting, Mrs. Hiller stated that she wanted David referred to the Committee on the Handicapped. n9 She also told those present that the persons at the BCH believed David should not do any writing in the classroom, but rather that all of his writing tasks should be performed on a word processor. n10 Relying on Mrs. Hiller's representations concerning the BCH's study, assertions which subsequently proved to be at variance with the actual written report, Brunswick [*962] implemented several changes in David's educational program which included, inter alia, the use of a word processor for all of plaintiff's written work. However, after allowing David unrestricted access to this device for several weeks, Davis noticed that disciplining David had become more of a problem, and that the plaintiff's use of the word processor was causing a deterioration in his organizational skills and his ability to shift his focus from one subject to another while in the classroom; therefore Davis limited the time David could spend using the word processor while in school.

-Footnotes-

n9 The Committee on the Handicapped has since been renamed, and will be referred to throughout this opinion as the Committee on Special Education ("CSE" or "Committee"). [**8]

n10 See minutes of the 2/14/86 meeting, Jt. Ex. A-18, pp. 2-3.

-End Footnotes-

On March 10, 1986, Mrs. Hiller wrote to Darlene Egelson ("Egelson"), the chairperson of the CSE, and requested in writing that the CSE designate David as a child with a handicapping condition. In this letter, Mrs. Hiller also provided Brunswick with a copy of the BCH report. This study observed, inter alia, that Davis had noticed that the plaintiff had difficulty concentrating during class, was easily distracted and demonstrated impulsivity in his work style. n11 The report also noted that plaintiff's fine motor skills were compromised by his impulsive behavior and his disorganized approach to tasks. n12 The study offered numerous suggestions relating to David's academic program at Brunswick, and concluded that (i) David would benefit from approximately thirty minutes to one hour of remedial assistance daily, (ii) writing assignments should be highly structured for David, (iii) plaintiff would benefit from practice in advanced word attack skills and spelling drills, (iv) David should be encouraged to learn word processing, and [**9] (v) the use a typewriter or a word processor at home and in school would be a useful adjunct in developing his skills in written expression by reducing the effort required in the mechanics of the task. n13

-Footnotes-

n11 See BCH report, Jt. Ex. A-46, p. 1.

n12 Id., p. 3.

n13 Id., p. 6.

-End Footnotes-

In response to Mrs. Hiller's request, Brittonkill notified the plaintiff's parents in writing that a CSE meeting would be held on April 8, 1986. At this meeting, the CSE heard presentations provided by plaintiff's mother, his teacher Hope Davis, and Brittonkill's psychologist Debra Marcal concerning David's condition. n14 The CSE also reviewed the findings of the BCH. Towards the end of this meeting, chairperson Egelson asked the members of the CSE if anyone present would recommend that David be classified as a child with a handicapping condition, however none of the members present so motioned. Realizing that the plaintiff nonetheless had special needs, Egelson emphasized to the members of the CSE that it was "incumbent upon [**10] [Brunswick] to make some other provisions for David", and accordingly arranged to have another meeting concerning the plaintiff's classroom programs on April 10, 1986. n15

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n14 The minutes of this 4/8/86 meeting are reproduced in Jt. Ex. A-21.

n15 See minutes of the 4/8/86 meeting, pp. 4-5.

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The chairperson of the CSE, the school principal, a speech pathologist, David's fifth grade teacher and Mrs. Hiller all met on this date to devise yet another remedial program for the remainder of David's fifth grade year. At the meeting, Mrs. Hiller conceded that her son had poor work habits that he would have to "unlearn" in order to be successful at school. n16 Brunswick explained to Mrs. Hiller the remedial program it had developed for the plaintiff, a plan which Mrs. Hiller conceded at trial met with her approval. n17 This program was implemented by the defendant, and David subsequently passed all of his fifth grade courses n18 as well as the statewide fifth grade writing test. n19

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n16 See minutes of the 4/10/86 meeting, Jt. Ex. A-22, p. 2. [**11]

n17 The remedial program developed by Brunswick is reproduced in Jt. Ex. A-11.

n18 David's fifth grade report card is reproduced in Jt. Ex. A-10.

n19 See Jt. Ex. A-9.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*963] On May 6, 1986, Mrs. Hiller met with the persons who were to become David's sixth grade teachers, and discussed with them the educational needs she believed David would have in the sixth grade. Approximately two weeks later, on May 19th, Sandy Surra, a speech pathologist for Brittonkill, re-administered the TOWL to David, at the request of the CST. His scores on this test were in the average range for all components of the exam except for that portion of the TOWL which tests an individual's writing abilities. n20 Surra therefore recommended that David's spelling and handwriting difficulties be monitored by Brittonkill, and that his progress in these areas be periodically re-checked. n21

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n20 See Jt. Ex. A-12.

n21 Id., p. 2.

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On June 19, 1986, [**12] David's parents once again privately arranged for an independent psychological evaluation of their son. In his report concerning David, Dr. Robert C. Williams ("Dr. Williams"), a licensed chologist, recommended that (i) David be identified as a student with a learning disability known as dysgraphia, (ii) David's curriculum be adjusted to allow for the use of a word processor for written assignments, (iii) alternative testing procedures be devised by Brunswick for David, (iv) David be taught remedial cursive writing, if at all, "independently of other content", and (v) resource room help be provided for the plaintiff as needed. n22 As a result of Williams' report, on July 9, 1986, Mrs. Hiller's attorney, Robert G. Wakeman, wrote a letter to Egelson (as the CSE chairperson) requesting, among other items, an impartial hearing to challenge Brunswick's April 8, 1986 determination not to classify plaintiff as a handicapped child, and reimbursement of the costs of Dr. Williams' psychological evaluation of David.

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n22 See psychological report prepared by Dr. Williams concerning David Hiller, 6/19/86, Jt. Ex. A-54, p. 5.

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[**13]

Approximately one month after receiving this letter, representatives of Brittonkill met with David's mother and her attorney at an informal meeting on August 11, 1986. While there, the defendant, in an effort to avoid further conflict and in a futile attempt by it to avoid litigation, agreed to classify the plaintiff as a student with a handicapping condition. They agreed to hold a ting of the CSE on September 9, 1986 wherein the Committee formally ermined that David was a child with a learning disability, n23 and proceeded to formulate a Phase I Individualized Education Program ("IEP") for the plaintiff. n24 This IEP was memorialized in a writing, and provided accommodations for David in his regular classroom and for the use of a word processor for some of his written assignments at his teacher's discretion. n25 Brittonkill implemented this IEP as the plaintiff entered sixth grade at Brunswick.

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n23 The parties are in disagreement over the reasons for Brittonkill's sudden reversal concerning its classification of David. The plaintiff claims that the defendant changed its position in light of Williams' study and the further testimony it heard concerning David's condition. The defendant maintains that it reversed the decision it had made only five months previously with respect to David as a way of placating the parents concerns and in an effort to avoid litigation. This court was more persuaded by the testimony of the defendant as it related to Brunswick's decision to classify David as a learning disabled child, and accordingly finds that Brittonkill classified David as a student with a handicapping condition only because it wished to avoid conflict with the plaintiff's parents, and not because it believed that David was actually handicapped. The hearing officer who reviewed this case prior to the instant proceeding similarly found this to be the true reason for defendant's classification of David. See the Findings of Fact and Decision of Hearing fficer Gordon S. Purrington, 11/7,10-12/86 ("Hearing Officer Report"), p. 9.

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n24 The minutes of this 9/9/86 meeting of the CSE are reproduced in Jt. Ex. A-34. An IEP is a written plan developed (in New York) by a school district's

CSE which specifies the special education programs and services to be provide by the school district in order to meet the unique educational needs of a handicapped child. See 20 U.S.C. @ 1401 (19), 8 N.Y.C.R.R. @ 200.1 (p).

n25 This Phase I IEP is reproduced in Jt. Ex. A-35.

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On October 3, 1986, the plaintiff's attorney wrote to the CSE chairperson and requested [*964] that Brunswick arrange for an impartial hearing whereby plaintiff's parents could determine both the appropriateness of the CSE's recommendations concerning David as well as the sufficiency of the Committee's data with respect to the plaintiff. This letter also requested reimbursement for the independent evaluations that had been conducted on David at the parents urging, and noted that David's parents wished to discuss the appropriateness of David's IEPs -- including the appropriateness of the yet to be developed Phase II IEP. n26

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n26 See letter from Robert G. Wakeman to Egelson, 10/3/86, Jt. Ex. A-38.

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[**15]

On October 8, 1986, David's resource room n27 teacher, Donna Fitzgibbons Langley ("Fitzgibbons Langley"), met with Mrs. Hiller to discuss the Phase II IEP Fitzgibbons Langley had tentatively prepared for use with David. This proposed IEP provided for writing and spelling remediation in the resource room, as well as remedial assistance to supplement plaintiff's regular academic classes. Mrs. Hiller objected to this Phase II IEP in that it addressed topics other than David's writing, spelling, and organizational skills. In an effort to appease David's mother, Brunswick revised its proposed Phase II IEP, and on October 23, 1986, at a meeting attended by Mrs. Hiller and her attorney, Brittonkill developed a Phase II IEP for the plaintiff which incorporated those changes requested by Mrs. Hiller. n28

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n27 A resource room is a room whereby students at Brittonkill are given individualized instruction, outside of the student's regular classroom courses, in subjects where the student needs special assistance.

n28 This Phase II IEP is reproduced in Jt. Ex. A-15.

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On November 7th, 10th, 11th, and 12th of 1986, hearing officer Gordon S. Purrington heard testimony presented by both parties concerning the education David was receiving at Brunswick. After reviewing all of the evidence before him, the hearing officer found, inter alia, that (i) Brittonkill reversed its earlier finding that David was not handicapped because it wished to avoid conflict and possible litigation, (ii) although Brittonkill's CSE failed to comply with most of the due process procedures concerning "Notice" as required the Commissioner of Education's ("the Commissioner's") regulations (8 N.Y.C.R.R. @ 200.5 (a)), such deficiencies were not prejudicial to the plaintiff in this particular instance, (iii) Brittonkill similarly failed to comply with the Commissioner's regulations when it failed to arrange for a CSE meeting within thirty days of Mrs. Hiller's request on February 14, 1986; however, as with Brittonkill's violations concerning the "Notice" requirements, these violations were non-prejudicial, (iv) the defendant had acted in good faith, responsibly, and timely in developing the Phase II IEP, (v) David did not have to use a word [**17] processor at all times, but that there was substantial evidence that its use may be required for extended writing tasks, (vi) plaintiff's parents were not entitled to reimbursement for either of the two independent evaluations they had arranged for their son, (vii) the Phase I IEP was appropriate for David, but that it lacked sufficient detail, and (viii) the Phase II IEP should be revised so as to integrate the courses David was being taught in the resource room with plaintiff's other classes. n29 The hearing officer then remanded the IEPs back to Brunswick's CSE noting that:

Overall, I find that the Phase I and Phase II IEP to be appropriate in meeting the needs of this child except in the areas noted. I remand these matters to the Committee on Special Education and that such deficiencies be corrected within 30 days after respondent has received this document. The child will continue in his present program during that time. n30

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n29 See Hearing Officer Report, pp. 9-22.

n30 Id., p. 21.

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The CSE met on [**18] January 22, 1987 to develop a revised Phase I IEP in response to the hearing officer's directive. This tentative IEP provided for the use of a word processor:

To complete all book reports, all research reports for the Culture Fair, all [*965] Science World assignments & science research reports and all English compositions & projects. May copy Science notes over on a Word Processor; may also do any Science class assignments over again on a word processor. May do any homework on a word processor. n31

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n31 This proposed Phase I IEP is reproduced at defendants' exhibit "4".

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Additionally, the IEP provided David with supplemental resource room assistance with Fitzgibbons Langley five times per week, and remedial assistance with Linda Macaione, a speech and language therapist, also for five times a week. Mrs. Hiller argued that David should not be taken out of his mainstream classes ten times per week, and that the portion of the proposed Phase I IEP which recommended the same was inappropriate. In yet another attempt to accede [**19] to the demands of plaintiff's mother, the CSE modified this tentative IEP and provided for supplemental assistance and remediation for David only eight times a week. Nevertheless, Mrs. Hiller refused to accept this modifie Phase I IEP proposal, and Brunswick and the Hillers ultimately failed to reach an agreement concerning the provisions of plaintiff's new Phase I IEP. When the plaintiff's parents appealed the hearing officer's decision to the Commissioner of Education four days after this meeting, David's "then current" Phase I IEP remained in place.

On April 30, 1987, the Commissioner issued a ruling concerning the plaintiff wherein he sua sponte found that David was not a learning disabled child, and ordered Brunswick to annul its decision to label David as learning disabled. n32

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n32 This ruling was subsequently set aside by this court in Hiller v. Bd. of Educ. of Brunswick Cent. Sch. D., 674 F. Supp. 73, 77 (N.D.N.Y. 1987) ("Hiller I").

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The following week, David was administered additional tests by [**20] the school's psychologist in order to ascertain whether David was in fact a child with a handicapping condition. Plaintiff's scores on these exams indicated that he was not learning disabled. For example, his results on the Stanford Binet Intelligence Scale indicated that the plaintiff possessed an IQ of 104, and that David fell within the average range for functioning skills; results comparable to the findings of the WISC-R performed on David approximately nineteen month previously. n33 Plaintiff's performance on the TOWL and the VIM tests demonstrated above average scores in the reading and math portions of the exams, and low average written language skills. David's relatively weak performance on this TOWL was explained by Marcal when she wrote, at the conclusion of David's psychological testing, that it was "important to mention [David's] haste in completing the TOWL. His effort on this instrument was notably less than on other measures administered by this examiner." n34 Marcal expanded on this comment when she testified at trial that David's low scores in the areas of thematic maturity, word usage, and style were attributable to the fact that he attempted to write (from memory) [**21] the same story on this administration of the TOWL that he had written for the TOWL he took in May of 1986.

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n33 See plaintiff's exhibit N, p. 2.

n34 Id., p. 3.

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In summarizing David's performance on these exams, Marcal noted in her psychological report of the plaintiff that:

> While David's written language and fine motor skills continue to fall below grade, they do show growth from his previous evaluation and his TOWL again fa into the average range of achievement compared to his agemates. n35

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n35 Id.

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On May 21, 1987, Brittonkill's CSE met and recommended that David not be eligible for special education services for the 1987-88 school year. n36 This decision was based upon the abovementioned psychological examinations performed on the plaintiff, as well as the testimony of David's [*966] sixth grade teachers. n37 At Mrs. Hiller's request, [**22] the CSE reconvened on June 11, 1987, and, based upon all of the information before it, clarified its May 21st determination and voted that David not be labeled as a child with a handicapping condition. n38 David went on to successfully complete all of his sixth grade courses at Brunswick. n39

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n36 See transcript of the 5/21/87 meeting of the CSE, plaintiff's exhibit K, p. 14.

n37 See id., pp. 1-9.

n38 See minutes of the 6/11/87 meeting of the CSE, plaintiff's exhibit P.

n39 See David's sixth grade report card, reproduced in plaintiff's exhibit

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The defendant continued to implement the special education components contained in plaintiff's IEPs until January of 1988, n40 when Brittonkill was notified by Mrs. Hiller that David had been withdrawn from Brunswick and enrolled in the Christian Brother's Academy ("CBA"); a private, sectarian school which offers no specific services for handicapped children, offers no special education programs or services and is not on the Commissioner's approved [**23] list of private schools in which handicapped students may be placed.

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n40 Mrs. Hiller requested that David be taken out of the resource room program entirely because she believed that he was not making any progress in this program. See transcript of the 5/21/87 meeting of the CSE, pp. 10-11.

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Mrs. Hiller and Ernest J. Casile, Jr., a teacher and school administrator of
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student at the CBA. n41 His academic improvement is partly attributable to the tutoring David is receiving after his classes at the CBA.

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n41 David successfully completed his seventh grade courses at the CBA. See plaintiff's exhibit X.

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Conclusions of Law

(1) Which party bears the burden of proof in the instant proceeding.

The first issue this court must resolve concerns the allocation of the burden [**24] of proof in this district court proceeding. The plaintiff contends that Brunswick must prove the appropriateness of its classification, programs and placement of David while the defendant argues that the burden of proof is properly placed on the plaintiff in that he is the party seeking to overturn the decision of the state educational agency. Since the Second Circuit has not yet ruled directly on this issue, a review of other court's decisions in this area is instructive.

In Lascari v. Board of Educ., 116 N.J. 30, 560 A.2d 1180 (N.J. 1989), the Supreme Court of New Jersey concluded that:

The obligation of the parents at the due process hearing should be merely to place in issue the appropriateness of the IEP. The school board should then bear the burden of proving that the IEP was appropriate.

Id. at 1188. The court reasoned that its holding was consistent with the intent of the statutory and regulatory schemes of the EAHCA, and that the burdens of persuasion and of production should be placed on the party better able to meet those burdens. Id. at 1188-89.

In Grymes v. Madden, 3 E.H.L.R. 552:183 (D.Del. 1979), aff'd. in mem. 672 F.2d 321 (3rd Cir. 1982), [**25] a child who was admittedly handicapped had received only a partial tuition reimbursement from the defendant school district and the Delaware State Board of Education for the education of their son, James, in a private school for learning disabled students during the pendency of their claim under the EAHCA. The parents of the child appealed this ruling to the district court, and sought full tuition reimbursement from the defendants.

The court held that since the defendants failed to prove to the hearing officer that the school district could provide James with an appropriate public education, they were required to pay the full cost of the tuition at the private school selected by James' parents. n42 In affirming the district court's ruling, the Third Circuit reasoned that:

[*967] The trial judge awarded the Grymeses an amount equal to full tuition because the local school district had failed to sustain its burden of proof that an appropriate public program existed.

Grymes, 672 F.2d at 322.

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n42 The school district in Grymes attempted to prove for the first time at the district court proceeding that it had developed an adequate program for James, and that therefore the plaintiffs were not entitled to the relief requested. In rejecting its offer of proof in this regard, the district court found that the objective of Delaware's program of educating handicapped sons would be "frustrated if the [school] District were permitted to ignore its obligation altogether in the due process hearing and then attempt to justify its actions in court a year and a half later." Id. at 322.

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[**26]

While at first glance this holding may appear to be placing the burden of proof on the school district in a district court proceeding, a review of the district court's reasoning in Grymes illustrates that its discussion focused on the burden of proof before a hearing officer, and not the burden of proof before a district court. n43

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n43 The plaintiff cited numerous opinions from the Commissioner of Education in further support of his contention that the burden of proof in the instant proceeding should be on Brunswick. While these decisions stand for the proposition that a school district has the burden of proving the appropriateness of its placement and programs concerning a handicapped child before both the hearing officer and the Commissioner, they never hold that the burden of proof in a district court proceeding is always on the school district. See e.g. Matter of Alfred and Vicki S., 18 Ed. Dep't. Reporter 397, 399 (1979), Matter of Handicapped Child 26 Ed. Dep't. Reporter 156, 157 (1986), Matter of Handicapped Child 26 Ed. Dep't. Reporter 100, 102 (1986), Matter of Handicapped Child 23 Ed. Dep't. Reporter 329, 330 (1984), Matter of Handicapped Child 23 Ed. Dep't. Reporter 348, 349 (1984), Matter of Handicapped Child 19 Ed. Dep't. Reporter 516, 517 (1980), Matter of Handicapped Child 19 Ed. Dep't. Reporter 233, 234 (1979).

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[**27]

Other courts considering this issue have clearly held that the burden of proof in a district court proceeding is on the party challenging the administrative determination. For example, in Tracey T. v. McDaniel, 610 F. Supp. 947 (D.C. Ga. 1985), the parents of a handicapped child brought on a motion to determine which party was to bear the burden of proof in an action to overturn the finding and decision of the state educational agency which upheld an IEP developed by the agency and local school officials. After carefully reviewing the differing positions held by the parties, the court concluded that the child and her parents bore the burden of proof with respect to their EAHCA claims. Id., 610 F. Supp. at 950.

In Speilberg v. Henrico County Public Schools, 853 F.2d 256 (4th Cir. 1988), cert. denied 489 U.S. 1016, 109 S. Ct. 1131, 103 L. Ed. 2d 192 (1989), the Fourth Circuit recently noted:

[The district court] assigned the burden of proof to the defendants as the party seeking to change [the handicapped child's] placement. The burden, however, is more properly allocated to the party bringing the civil action to challenge the state administrative decision. Although [**28] we reach the same result as the district court based on procedural noncompliance, infra, we cannot affirm its reasoning because of the misallocation of the burden of proof (citations omitted) (emphasis added).

Speilberg 853 F.2d at 258, n. 2.

Similarly, in Kerkam v. McKenzie 274 App. D.C. 139, 862 F.2d 884 (D.C.Cir. 1988), the court, in placing the burden of proof in a district court proceeding on the party challenging the hearing officer's decision, found that:

> Such an allocation of the burden accords with [Hendrick Hudson Dist. Bd. of Ed. v.] Rowley's, [458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982)] requirement of deference to the state agencies that must follow the statutorily mandated procedures -- in this case, the hearing officer (citations omitted).

Kerkam 862 F.2d at 887. See also Anderson v. District of Columbia, 877 F.2d 1018, 1019 (D.C. Cir. 1989), Bales v. Clarke, 523 F. Supp. 1366, 1370 (E.D. Va. 1981).

After due consideration, this court finds the reasoning in this latter group of cases more persuasive, and holds that the party challenging the findings of the administrative determination in a district court proceeding, (in the instant case the [*968] plaintiff,) [**29] must prove, by a preponderance of the evidence, that the administrative findings should be set aside.

(2) The deference to be accorded to the hearing officer's findings of fact.

The standard for evaluating claims brought under the EAHCA is set forth in 20 U.S.C. @ 1415(e)(2). This section provides that parties who have exhausted the administrative remedies:

> Shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph, the court shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

In interpreting this provision of the Act, the Supreme Court, in Rowley, supra, found that:

> The provision that a reviewing court base its decision on the "preponderance of the evidence" is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school [**30] authorities which they review. The very importance which Congress has attached to compliance with certain procedures in the preparation of an IEP would be frustrated if a court were permitted simply to set state decisions at nought. The fact that @ 1415(e) requires that the reviewing court "receive the records of the [state] administrative proceedings" carries with it the implied requirement that due weight shall be given to these proceedings.

Id., 458 U.S. at 206, 102 S. Ct. at 3051, 73 L. Ed. 2d 690.

In Town of Burlington v. Mass. Dep't. of Educ., 736 F.2d 773 (1st Cir. 1984 aff'd. sub nom. 471 U.S. 359, 105 S. Ct. 1996, 85 L. Ed. 385, 85 L. Ed. 2d 385 (1985), the First Circuit emphasized that:

> [illegible] determination of what is "additional evidence" must be left to the discretion of the trial court which must be careful not to allow such evidence to change the character of the hearing from one of review to a trial de novo.

Id., 736 F.2d at 791. The court continued by noting that:

> In recognition of the expertise of the administrative agency, [the court] must consider the findings carefully and endeavor to respond to the hearing officer's resolution of each material issue. After [**31] such consideration, the court is free to accept or reject the findings in part or in whole. There is a corollary to this rule. Where a state administrative decision rules a proposed IEP invalid because it has not met the state's substantive or procedural requirements pertaining to a free appropriate public education for a particular disabled child, a federal court should accord the findings deference.

Id. at 792.

A number of other courts, including the Second Circuit, have held that the administrative findings in lawsuits brought under the EAHCA should be accorded some degree of deference. See e.g. Briggs v. Board of Educ. of State of Conn., 882 F.2d 688, 693 (2d Cir. 1989) ("deference is owed to state and local agencies having expertise in the formulation of educational programs for the handicapped (citing Rowley)), Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 981 (4th Cir. 1990) (court has obligation to consider the administrative findings carefully and respond to the administrative resolution of the issues), Anderson, supra, 877 F.2d at 1025 (authority of the district court to receive new evidence [illegible]s not transform the proceedings into a trial de [**32] novo), Bertolucci v. San Carlos Elementary School Dist., 721 F. Supp. 1150, 1154 (N.D.Cal. 1989) (courts must give due weight to administrative proceedings in EAHCA cases).

In the instant proceeding, this court has carefully reviewed the findings of hearing officer Purrington, and has afforded those findings due weight in reaching its own [*969] conclusions concerning the education and services provided by Brittonkill to David. n44

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n44 The plaintiff argued in his post-trial memorandum that the administrative findings should be accorded no deference in this proceeding. This contention is premised on the numerous procedural violations the defendant allegedly committed while David was a student at Brunswick. However, the hearing officer found that the procedural violations complained of were non-prejudicial, and, as discussed infra, the plaintiff likewise failed to prove at trial that any procedural violations committed by the defendant were prejudicial to the plaintiff or his parents. Therefore, this court finds that the administrative findings in this proceeding are entitled to the "due weight" discussed by the Supreme Court in Rowley.

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[**33]
[illegible] Procedural violations committed by Brunswick.

The plaintiff claims that David was denied an appropriate education because of numerous procedural violations allegedly committed by the defendant. For example, the plaintiff argues that Brittonkill violated 34 C.F.R. @ 300.504(a) when it failed to notify David's parents of its decision not to refer David the CSE in September of 1985. However, this regulation states that written notice must be given to the parents of a handicapped child before a decision is made by a public agency to refuse to, inter alia, evaluate the placement of a child. As stated supra, Brunswick had no reason to believe that David was handicapped in September, 1985. His fifth grade teacher believed David only had a learning problem. Davis asked the CST to determine if David may have had a learning disability not because she believed David was handicapped, but rather because Mrs. Hiller requested that Davis include this question on the CST referral form. Since David had not been declared a handicapped child in the fall of 1985, Brunswick committed no procedural violations when it failed to notify the plaintiff's parents of its decision not [**34] to refer David to the CSE. n45

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n45 New York regulations similarly did not require Brunswick to refer David to the CSE in the fall of 1985. 8 N.Y.C.R.R. @ 200.4 provides that "[a] pupil suspected of having a handicapping condition shall be referred in writing to the chairperson of the district's committee on special education. . . ." (emphasis added) Since the defendant believed David had a learning problem, but not a learning disability, there was no reason for it to refer David to the CSE.

Plaintiff, relying on Quackenbush v. Johnson City School District, 716 F.2d 141 (2d Cir. 1983) cert. denied 465 U.S. 1071, 104 S. Ct. 1426, 79 L. Ed. 2d 750 (1984) and New York City Bd. of Educ. v. Ambach 88 A.D.2d 1075, 452 N.Y.S.2d (3rd Dep't. 1982), claims that David's parents should have been informed of a of their procedural rights once Brunswick referred David to its school psychologist. However, Quackenbush involved a claim where the defendant knew or should have known that the child was handicapped, therefore the child's parents had to be notified in writing of the CSE's actions pursuant to 8 N.Y.C.R.R. @ 200.5(a)(1). The third department's holding in Ambach is equally distinguishable. There, the disabled child's mother asked the Committee on the Handicapped to evaluate her son for a possible handicapping condition. Despite the provisions of 8 N.Y.C.R.R. @ 200.5(a)(1), the school district failed to notify the plaintiff's parents of its determination in writing, and committed other procedural violations after receiving the mother's request for an evaluation of her son.

In the instant case, neither the defendant nor Mrs. Hiller requested that David be referred to the CSE in the fall of 1985, because at that time he was only suspected of having a learning problem; thus procedural regulations concerning the parents of handicapped children were inapplicable at this time.

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[**35]

Plaintiff also notes that Mrs. Hiller orally requested a meeting with the CSE on February 14, 1986, yet the meeting did not take place until April 8, 1986; thereby violating the provisions of 8 N.Y.C.R.R. @ 200.4(c), which requires the CSE to make a recommendation concerning a child not previously identified as having a handicapping condition to the Board of Education within thirty (30) days of the receipt of the parent's consent to the evaluation. n46 After this April 8th meeting, the defendant did not prepare a written report of the results of the evaluation as is required by 34 C.F.R. @ 300.543. Additionally, the

Plaintiff demonstrated, before the hearing officer and at trial, that on several occasions Brunswick failed to fully comply with various procedural requirements set forth in 8 N.Y.C.R.R. @ 200.5(a). Plaintiff contends that these failures by Brunswick to meet [*970] the Act's procedural requirements are adequate grounds by themselves for holding the defendant liable in this action. This argument is not persuasive.

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n46 Brunswick claims that Mrs. Hiller never formally requested a meeting with the CSE until her letter dated March 10, 1986, which is reproduced at Jt. Ex. A-52.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -
[**36]

One of the primary purposes of the procedural requirements of the EAHCA is to ensure that parents remain actively involved in formulating the plans and policies developed by state and local agencies for handicapped children. Rowley, supra, 458 U.S. at 208, 102 S. Ct. at 3052. In support of his contention that the procedural violations committed by Brunswick deprived David of a free, appropriate education, plaintiff cites Hall v. Vance County Bd. of Educ., 774 F.2d 629 (4th Cir. 1985), and Board of Educ. of Cabell County v. Dienelt, 843 F.2d 813 (4th Cir. 1988). However, plaintiff's reliance on these cases is misplaced.

In Hall, it was uncontroverted that the defendant school district failed to notify the parents of James, a child suffering from dyslexia, of their procedural rights for a period of almost three years. Additionally, the defendant had misled the parents by suggesting that they hire a tutor for their handicapped child at their own expense, without informing them of the possibility of public funding for that tutor. Similarly, after the parents announced their intention to withdraw James from the public school, the school district failed to discuss with them [**37] the possibility of public funding for residential schooling. Id., 774 F.2d at 634-35. The court noted:

Rowley recognizes that parental participation is an important means of ensuring state compliance with the Act. Unless school systems apprise parents of their procedural protections, however, parental participation will rarely amount to anything more than parental acquiescence, because parents will presume they have no real say, and the participatory function envisioned by Rowley will go unfilled.

Hall, 774 F.2d at 634.

In Dienelt, supra, the district court ordered the Cabell County Board of Education to reimburse the Dienelts for the tuition and related expenses incurred by placing Paul, a learning disabled child, in a private school because the school district failed to adequately involve the Dienelts in the preparation of Paul's proposed IEP. The Fourth Circuit found that, as a result of the school district's procedural violations concerning Paul's educational program, "the [school] Board utterly failed to determine the special educational needs of Paul Dienelt or to provide him with an adequate IEP." Id., 843 F.2d at 815.

Unlike the parents in [**38] Hall or Dienelt, David's parents actively participated in the development of plaintiff's educational program throughout his enrollment in the defendant school district. While Brunswick did, at times, violate the letter of the law concerning the procedures involved in developing and implementing educational programs for David, the plaintiff failed to prove that any of these violations prejudiced the plaintiff or his parents in any way. In fact, the proof at trial demonstrated to this court that the plaintiff's parents were thoroughly involved in the planning, formulating and execution of David's educational program while at Brittonkill, and that the defendant fully complied with the spirit of the EAHCA in its dealings with the plaintiff and his parents. In such cases, it is inappropriate to find that a handicapped child was denied a free and appropriate education solely on the basis of a school district's violations of the Act's procedural requirements. See Max M. v. Illinois State Bd. of Educ., 629 F. Supp. 1504, 1517-18 (N.D.Ill. 1986).

(4) David's status while a student in the Brittonkill School District.

Before determining whether David was a learning disabled child [**39] during his enrollment at Brunswick, it is important to review how that term is defined by both federal and state regulations.

In order to be classified as learning disabled under the EAHCA, a child must show a severe discrepancy between achievement and intellectual ability in one or more of the following areas: (i) Oral expression; (ii) Listening comprehension; (iii) Written expression; (iv) Basic reading [*971] skill; (v) Reading comprehension; (vi) Mathematics calculation; or (vii) Mathematics reasoning. 34 C.F.R. @ 300.541(a), Riley v. Ambach, 668 F.2d 635, 637-38 (2d Cir. 1981).

New York state has defined a learning disabled student as "[a] child who exhibits a discrepancy of 50 percent or more between expected achievement and actual achievement determined on an individual basis." See 8 N.Y.C.R.R. @ 200.1(cc)(3).

While the federal "severe discrepancy" standard is not identical to the state "50 percent" standard, the Second Circuit has noted that "the 50% standard may in practice prove to be no more restrictive than the severe discrepancy rule." Riley, supra, 668 F.2d at 641.

With these somewhat amorphous, yet similar standards in mind, this court must determine [**40] if David was a learning disabled child while a student at Brunswick, and if so, whether Brunswick complied with the requirements of the Act in the educational programs it developed for the plaintiff.

(a) The 1985-86 academic year.

The plaintiff failed to prove that David was a handicapped child while in fifth grade at Brunswick during the 1985-86 school year. When he enrolled in Brittonkill, no one in the school district was informed that David was suffering from any physical or learning disability, or that he had any handicapping condition. When his teacher noticed that David was experiencing problems with his handwriting, organization and attention span, Davis referred the plaintiff to Brunswick's CST. The school's psychologist performed various tests on Davi tests which are typically used to determine if a child has a learning disability. The cognitive tests demonstrated that David's IQ was high average. The PIAT indicated that David was functioning at or above his current grade [illegible]el in all areas but spelling. Additionally, his handwriting was legible and similar to that of an average seventh grader. n47

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n47 See Jt. Ex. A-2, pp. 1-2. David's fifth and sixth grade teachers testified at trial that other students in Brunswick had handwriting which was much worse than David's.

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[**41]

Dr. Frank Vellutino, a clinical psychologist and expert witness for the defendant, reviewed David's performance on various psychological tests n48 and testified at trial that the plaintiff's above average score on the Wechsler Block Design subtest was inconsistent with a neurologically based learning disability. n49 He explained that a neurologically based handicap would have affected other aspects of plaintiff's life, including, inter alia, David's ability to walk and learn a language; yet there was no evidence that David ever experienced any of these problems. Dr. Vellutino attributed David's poor performance on some of the easier psychological tests to plaintiff's impulsivity, lack of attendance to detail and personal style. With respect to David's handwriting, Dr. Vellutino testified that he was "mystified" that people claimed David had a handwriting disability. n50

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n48 While Dr. Vellutino conceded that he had not examined David personally because he believed Mrs. Hiller would have refused such a request, (and that his opinion might have changed had he so examined David,) he testified at trial that he could determine whether David was handicapped without an individual examination by thoroughly analyzing the results of the psychological tests performed on David. [**42]

n49 The average score on the Wechsler Block Design subtest is a 10; David scored a 12 on this portion of the exam. See Jt. Ex. A-2, p. 2.

n50 Drs. Robert C. Williams and Anne Meyer both testified that David is learning disabled, however neither of these doctors explained to the satisfaction of this court how a learning disabled child could have performed so well on the October, 1985 psychological exams. On balance, this court found the testimony of Dr. Vellutino more credible than that of Drs. Williams and Meyer concerning whether David was a handicapped child during the 1985-86 school year.

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After thoroughly evaluating all the evidence before it, this court finds that David was not a learning disabled child, as that term is defined by either federal or state guidelines, during the 1985-86 academic year. Therefore, Brunswick was under no obligation to refer David to the CSE at this time, and the remedial program developed [*972] by the defendant school district was [illegible] legally sufficient and appropriate for the academic needs of David.

(b) The 1986-87 academic year.

On September 9, 1986, in an [**43] attempt to avoid litigation with plaintiff's parents, Brunswick's CSE unanimously declared David a child with a learning disability, and developed and implemented Phase I and Phase II IEPs for the plaintiff. The Hillers appealed the CSE's determination to an impartial hearing officer, alleging that the IEPs did not provide David with an appropriate education. In particular, the Hillers claimed that the programs were deficient because David was not allowed to use a word processor at all times while in the classroom. The hearing officer found the IEPs appropriate in meeting the needs of David, but remanded them to the CSE for more specificity and detail, with the direction that Brunswick more fully integrate David's remedial program with his regular classroom courses. The Hillers subsequently appealed the hearing officer's findings to the Commissioner. n51

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n51 David's eligibility under the EAHCA was not contested by either party on this appeal, or in the appeal before the hearing officer.

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In finding the Hillers not entitled [**44] to reimbursement for the two independent psychological examinations conducted by the BCH and Dr. Williams, the Commissioner held that the district's evaluations were "adequate to ascertain both the nature of the boy's academic problems and the appropriate measures to remedy that deficit." He then, sua sponte, reversed the CSE's finding that plaintiff was handicapped, and explained that while the evaluati[illegible] and psychological tests performed on David indicated distinct problems in plaintiff's handwriting, the results did not reflect a severe discrepancy between actual and expected performance.

In Hiller I, this court held that the Commissioner exceeded the scope of his authority when he reversed the CSE's determination that David was handicapped, because none of the parties had raised that issue on appeal. This court also declared David a handicapped child for the 1986-87 academic year. Id., 674 F. Supp. at 77. Thus, at this stage in the proceeding, this court is bound by the CSE's determination that David was a learning disabled child during his sixth grade at Brunswick. n52

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n52 In its post-trial memorandum, the defendant noted that it does not challenge the 1986 classification of David as a handicapped child. See post-trial memorandum of defendant Board of Education, p. 41.

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[**45]

Every New York school district must provide a resident handicapped child with a free and appropriate public education specifically designed to meet his needs by means of an IEP developed by the school district's Committee on Special Education. See 20 U.S.C. @ 1400 et seq., N.Y. Education Law @ 4401 et seq., 8 N.Y.C.R.R. Part 200.

A school district is not required to implement a program that will maximize the handicapped child's potential. Rowley, supra, 458 U.S. at 198-99, 102 S.

[illegible] at 3046-47. Rather, in examining the appropriateness of an educational program developed pursuant to the EAHCA, a court's inquiry is twofold:

> First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more (footnotes omitted) (emphasis added).

Id., 458 U.S. at 206-07, 102 S. Ct. at 3051.

In discussing the requirements of an IEP, the Rowley court held:

> The IEP, and [**46] therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade (emphasis added).

Id., 458 U.S. at 203-04, 102 S. Ct. at 3049.

[*973] This court has already held that Brunswick sufficiently complied with the procedures set forth in the Act, therefore the only remaining inquiry is whether the IEPs developed by the defendant were reasonably calculated to [illegible]able David to receive educational benefits.

Plaintiff claims that the programs developed by Brunswick for David were inadequate because they allegedly failed to identify or address the major defects found in David's psychological testing, and deferred the use of the word processor to the discretion of his classroom teachers. Plaintiff further argues that the full time use of a word processor in the classroom is necessary to meet David's unique needs.

A school district's CSE, and not the handicapped child's parents or professionals hired by the parents, bears the ultimate responsibility [**47] for establishing an appropriate IEP; the CSE is not obligated to accept the recommendations of outside professionals or follow the preferences of the parents. See e.g. Matter of Nancy B., 17 Ed Dep't. Rep. 42, 43-4 (1977), Matter of Handicapped Child, 23 Ed Dep't. Rep. 335, 336 (1984), Matter of Handicapped Child, 21 Ed Dep't. Rep. 544, 547 (1982), Matter of Gerald H., 17 Ed Dep't. Rep. 419, 422 (1978); Cothern v. Mallory, 565 F. Supp. 701, 707-08 (W.D. Mo. 1983) (IEP developed by school district not only appropriate for handicapped child but also superior to the program recommended by child's parents).

In the instant case, the Phase I IEP developed by Brunswick's CSE: (i) recognized that David had fine motor delays, (ii) noted that David was somewhat distractable and responded impulsively, (iii) provided for extended time limits for written tasks, (iv) allowed David the use of alternative test locations, (v) permitted the use of a word processor at his teacher's discretion, and (vi) [illegible]vided David access to Brunswick's resource room five times per week to improve his organizational and expressive writing skills, as well as his capacity to transfer ideas into written [**48] form. n53

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n53 See Jt. Ex. A-35.

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The Phase II IEP implemented by Brunswick's CSE established as a goal for David increased skills in his mainstream classes with particular emphasis on improving his expressive writing abilities, organizational skills and ability to process thoughts and ideas in written form. The defendant, through various teaching methods and materials, sought to achieve these goals by strengthening David's (i) cursive handwriting skills, (ii) writing and vocabulary skills in social studies, science, and language arts, (iii) study skills, test-taking abilities and organizational skills, and (iv) basic composition skills and written expression. Brunswick monitored David's progress in these areas on either a daily or weekly basis. n54

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n54 See Jt. Ex. A-15.

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While the hearing officer found the Phase I IEP lacking in sufficient detail, [**49] and the Phase II IEP deficient in that it did not more fully integrate plaintiff's resource room activities with other areas in David's schooling, h[illegible] concluded that both of these programs were otherwise appropriate in meeting t[illegible] needs of David. This court concludes that the programs developed by Brunswick were appropriate for David's needs and satisfied the requirements of N.Y. Education Law @ 4401 et seq., 8 N.Y.C.R.R. Part 200 and the EAHCA.

An examination of David's progress from fifth to sixth grade demonstrates that these IEPS were reasonably calculated to enable David to receive educational benefits, achieve passing marks and advance from grade to grade. n55 As his report card [*974] indicates, David's relatively low final marks in sixth grade were attributable to the fact that David (i) did not always give his best effort, (ii) failed to complete his homework and/or classroom assignments, and (iii) often talked during some of his lessons with his classmates. n56 Ms. Joanne Gallagher, David's sixth grade Science teacher, testified at trial that the plaintiff was careless, easily distracted by other students and had poor organizational skills typical of a sixth grader. She also [**50] noted that his grades would have been better had David put more effort into his work and turned in all of his assignments. Similarly, David's sixth grade English teacher, Mr. Edward C. Peck, Jr., testified that plaintiff's final graded was lowered because David failed to turn in all of his homework assignments and had poor organizational skills. In sum, David clearly received educational benefits from the programs developed by Brunswick. His less than outstanding performance was due to a combination of his lack of effort, disorganization and failure to turn in all of his required assignments; it was not the result of allegedly inadequate educational programs devised by the defendant.

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n55 The following is a comparison of some of David's fifth and sixth grade marks:

	Fifth Grade, Fourth Quarter Grades	Sixth Grade Final Averages
English:	C	69
Social Studies:	B-	73
	35	
Science:	C-	69
Mathematics:	D	67
Reading	B-	74

A letter grade of "U", or a numerical grade below 65 is failing in Brunswick. [**51]

n56 See plaintiff's exhibit AF, "Effort" and "School Conduct" sections.

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Even if, contrary to the findings of this court, the IEPs had been deficient in certain areas, the Hillers prevented the defendant from curing any defects in the programs. Brittonkill's CSE, in response to the hearing officer's remand, developed a revised Phase I IEP which noted that David: (i) had weak selective attention skills, (ii) was easily distracted and may respond impulsively, (iii) had difficulty with organizing and following through tasks, (iv) required "much structure" for his written tasks, (v) needed increased time limits for written tasks, (vi) required assistance in overcoming irresponsibility, (vii) lacked attention to details, (viii) had poor work-study habits, and (ix) needed assistance to assure the completion of his assignments. It also proposed remedial assistance for David eight times per week, provided for extensive use of a word processor, waived time limits for all of David's written tests and discussed in detail the annual goals and short-term objectives of the program. n57

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n57 See defendant's exhibit 4. While this IEP initially proposed resource room assistance for David ten times per week, Egelson testified at trial that, in an effort to accommodate the wishes of Mrs. Hiller, Brittonkill reduced the scheduled hours of assistance of this type to only eight times per week.

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[**52]

Even though this proposed IEP addressed the majority of the recommendations contained in the BCH report, the Hillers rejected this program because Mrs. Hiller believed the resource room assistance suggested was too extensive, (whereby keeping David out of the classroom more than she believed was necessary,) and because the IEP did not allow David to use a word processor in the classroom at all times. Since the Hillers rejected this proposed Phase I IEP, n58 David's "then current" program remained in place for the remainder of David's sixth grade because the Hillers had informed Brunswick that they would be appealing the hearing officer's decision. See 20 U.S.C. @ 1415(e)(3), Hon v. Doe, 484 U.S. 305, 323-329, 108 S. Ct. 592, 604-07, 98 L. Ed. 2d 686 (1988).

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n58 While Brittonkill's revised Phase I IEP may have been superior to the original program developed by Brunswick, it is worthy of repeating that this court finds that the IEPs originally developed and implemented by Brunswick were reasonably calculated to enable David to receive educational benefits, and therefore complied with the requirements of the EAHCA.

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[**53]

With respect to plaintiff's contention that full time use of a word processor was necessary for David, the court finds this position untenable. All of David's former teachers who appeared at trial testified that David could write, although they conceded [*975] that his writing was below average. n59 While it may have been more difficult for David to handwrite his own notes and exams as opposed to using a word processor to do the same, it is clear that David could write. After carefully considering all of the evidence before it concerning this issue, this court finds that it would have been an educational disservice to this sixth grader had Brunswick permitted David to rely solely on a word processor rather than strengthening a skill as fundamental as handwriting. Additionally, the programs devised by Brunswick's CSE appropriately addressed David's handwriting deficiencies by ensuring that David utilized this skill n only when he was in the resource room, but also while he attended his mainstr classes.

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n59 See trial testimony of Debra Marcal, Edward C. Peck, Jr., Joanne Gallagher and Linda Dagel.

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[**54]

(c) The 1987-88 academic year.

On April 30, 1987 the Commissioner ordered Brunswick to annul its determination that David was a child with a learning disability. In response to this ruling, David was administered a new series of psychological tests in order to determine whether David in fact had a learning disability. As discussed supra, his scores on these exams ranged from above average to low average, with his low scores on subparts of the TOWL attributable to a combination of David's haste in completing the exam, his lack of effort, and attempt to write from memory a story he had written one year earlier. Soon after these exams were given, Brittonkill's CSE, after hearing testimony from Marcal relating to David's performance on these exams and David's sixth grade teachers, recommended that David be ineligible for special education services for the 1987-88 school year. This decision was formalized in a meeting held by the CSE on June 11, 1987. Recognizing David's right to remain in his "then current" placement whi plaintiff's parents appealed the CSE's determination and not wishing to prejudice David's rights in any way, the defendant continued to provide David with the special [**55] education components of his IEP throughout the time [illegible]id attended Brunswick. n60

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n60 Mr. and Mrs. Hiller withdrew David from Brunswick in January of 1988.

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As with the evidence concerning David's fifth grade at Brunswick, this court holds that the credible evidence supports a finding that David was not a handicapped child during the 1987-88 academic year. David's overall scores on the psychological tests he was administered in May, 1987 ranged from above average to low average; with below average scores on subparts of the TOWL attributable to plaintiff's personal style, rather than his physical or mental capabilities. Plaintiff's scores on these exams, coupled with the testimony of Marcal, Egelson and Dr. Vellutino, leads this court to conclude that David was not learning disabled under either New York or federal regulations in the 1987-88 school year. Therefore, Brunswick was under no obligation to provide David with special education services at this time.

(5) Tuition and tutor expenses incurred by the Hillers [**56] .

Since January, 1988, David has been attending school at the CBA in Albany, New York, and has been tutored by various individuals, some of whom are certified in the field of special education. In this action, plaintiff's parents [illegible]k reimbursement for both the tuition they have paid to the CBA, as well as [illegible] the money they have expended in providing David with tutorial services. However, this claim is based on the assumption that (i) David is a child with a learning disability and (ii) the IEPs developed by Brunswick for David had not satisfied the requirements of the EAHCA. n61

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n61 See plaintiff's post-trial memorandum of law, pp. 65-75.

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As discussed above, this court has found that David was not a handicapped child in the 1987-88 academic year, the year in which the Hillers removed their child from Brunswick, enrolled him in the CBA and implemented a tutorial program [*976] for David. Since he was not a handicapped child at this time, David was not entitled to special education services, nor was Brunswick under an obligation [**57] to implement an IEP for David. Additionally, the programs implemented by the defendant at the time Brunswick's CSE classified David as handicapped met all requirements of the Act.

It is axiomatic that the plaintiff would only be entitled to reimbursement for tuition and tutorial expenses if he was the prevailing party in this litigation. See 20 U.S.C. @ 1415(e)(4), Burlington School Committee v. Dep't. of Educ., supra, 471 U.S. 359 at 369-371, 105 S. Ct. at 2002-03, 85 L. Ed. 2d 385 [illegible]85), Gregory K. v. Longview School Dist., 811 F.2d 1307, 1315 (9th Cir. 1987) [illegible]rts may order school district to reimburse parents' educational expenses when a school district improperly changes a special education placement or proposes an inappropriate placement.) Since the Hillers were not prevailing parties in this action, they are not entitled to reimbursement for tuition paid to the CBA, or for monies expended in providing David with tutorial services.

(6) Attorneys Fees.

Pursuant to 20 U.S.C. @ 1415(e)(4)(B), the parents of a handicapped child who is the prevailing party in an action brought under the Act are entitled to an award of reasonable attorneys' fees. Since the plaintiff [**58] is not the prevailing party in this action, however, he parents are not entitled to an award of attorneys' fees.

With respect to the defendant, Brunswick similarly seeks an award of "costs, expenses, and attorneys' fees incurred by the Defendant in defending this action." n62

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n62 See post-trial memorandum of defendant Board of Education, p. 59.

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Where a trial court determines that a plaintiff has brought an action under the EAHCA in bad faith, the district court has the inherent authority to award attorney fees to the prevailing defendant. See Benner v. Negley, 725 F.2d 446, 449 (7th Cir. 1984). In the instant case, it is clear to this court that neither the plaintiff nor the defendant ever acted with any malice or in bad faith in litigating this action, but rather that both parties acted in good faith throughout the course of this proceeding. Accordingly, this court holds that both parties should bear their own costs, attorneys' fees, and other expenses.

To conclude, this court holds that:

(1) the plaintiff [**59] bore the burden of proof in this action in that he was the party challenging the findings of the administrative determination,

(2) administrative findings are to be afforded due weight in actions brought under the EAHCA,

(3) procedural violations committed by Brunswick did not deprive the Hillers of their rights under the Act and were non-prejudicial to plaintiff's parents,

(4) David was not a handicapped child during the 1985-86 and 1987-88 academic years,

(5) the program implemented by Brunswick during the 1986-87 school year was reasonably calculated to enable David to receive educational benefits, and therefore complied with the requirements of the EAHCA,

(6) plaintiff's parents are not entitled to reimbursement for tuition and tutorial expenses, nor for their attorneys' fees, and

(7) defendant's request for attorneys' fees is denied because there was no evidence that the plaintiff or his parents ever acted in bad faith during the course of this proceeding.

Accordingly, the complaint herein is dismissed and judgment shall be entered in favor of the defendant.

IT IS SO ORDERED.

2ND CASE of Level 2 printed in FULL format.

MAIRIN DOYLE; BRIAN DOYLE; MARGARET DOYLE,
Plaintiffs-Appellants, v. ARLINGTON COUNTY SCHOOL BOARD,
Defendant-Appellee, and ARTHUR W. GOSLING; JOHN S. DAVIS;
VIRGINIA DEPARTMENT OF EDUCATION, Defendants.

No. 90-2427

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

1991 U.S. App. LEXIS 29587

February 6, 1991, Argued
December 19, 1991, Decided

PRIOR HISTORY: [*1] Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Claude M. Hilton, District Judge. (CA-89-1416-A)

DISPOSITION: AFFIRMED IN PART, VACATED IN PART, AND REMANDED WITH INSTRUCTIONS

COUNSEL: ARGUED: Michael Jeffrey Eig, BOGIN AND EIG, Washington, D.C., for Appellants.

John Francis Cafferky, HUNTON & WILLIAMS, Fairfax, Virginia, for Appellee.

ON BRIEF: Matthew B. Bogin, Margaret A. Kohn, BOGIN AND EIG, Washington, D.C. for Appellants.

Thomas J. Cawley, Grady K. Carlson, HUNTON & WILLIAMS, Fairfax, Virginia, for Appellee.

JUDGES: Before WIDENER, Circuit Judge, CHAPMAN, Senior Circuit Judge, and MULLEN, United States District Judge for the Western District of North Carolina, sitting by designation.

OPINIONBY: WIDENER

OPINION: OPINION

WIDENER, Circuit Judge:

Mairin Doyle and her parents, Brian and Margaret Doyle, appeal from the district court's judgment in favor of the Arlington County School Board, affirming the educational program proposed for Mairin by the Board. They argue on appeal that the district judge erred in not recusing himself, that the district court did not give proper deference to the factual findings of the hearing officer, and that there were substantive and procedural [*2] violations of the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. @@ 1400-1485. n1 We find no error on the question of recusal. However, we are of opinion the district court committed reversible error in not considering the administrative findin Therefore, the district court judgment is vacated and the case is remanded wi instructions that the district court give "due weight" to the administrative findings. We do not, at this time, consider the claimed procedural and substantive violations of the IDEA as the district court should first have an ortunity to reconsider its decision using the proper standard.

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n1 At the time this case was filed, this chapter was known as the Education of the Handicapped Act (EHA). The name change became effective on October 1, 1990.

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Mairin Doyle, now fourteen years old, is a profoundly learning disabled child as a result of the surgical removal of a malignant brain tumor in 1981 and subsequent chemotherapy and radiation therapy. In 1984, the Arlington County school [*3] system and the Doyles agreed on an Individualized Education Program (IEP) which provided that Mairin would attend Taylor Elementary School, a public school in Arlington County, with special education resource room support and occupational therapy for her first grade year in 1984-85. However, before the beginning of the 1984-85 school year, the Doyles changed their minds and decided to place Mairin at the Lab School of Washington, a private school for handicapped students in Washington, D.C. Mairin has attended the Lab School since first grade.

On June 28, 1988, the Doyles requested that the school system place and fund Mairin at the Lab School. At a two-day Individualized Education Program (IEP) meeting held in December 1988, the school system proposed that an appropriate program was available for Mairin in a self-contained class taught by Charlotte right for learning disabled students at the Nottingham Elementary School. ttingham is a public school and is located in Arlington County, approximately two miles from Mairin's home.

The Doyles objected to the IEP and Mairin's placement at Nottingham and requested an administrative hearing seeking public payment of Mairin's Lab [*4] School tuition and expenses for the 1988-89 school year. The local hearing officer, after taking evidence, decided in favor of the Doyles. The Board appealed the decision of the local hearing officer to a state level review officer. The review officer, who took no additional evidence, found that the Board's proposed school placement at Nottingham met the mandates of the Individuals with Disabilities Education Act.

The Doyles then filed suit in the United States District Court for the Eastern District of Virginia on September 27, 1989. At trial, the full administrative record was submitted to the court. In addition, the parties presented the testimony of several witnesses. The district court agreed with the review officer and found no violation of the IDEA.

We find no merit to the Doyles' contention that the district judge erred in not disqualifying himself under 28 U.S.C. @ 455(a). That statute provides that "any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. @ 455(a). The Doyles argued that since Judge Hilton had been a member of the Arlington County School Board [*5] when the Doyles first applied for ial education services, his impartiality might reasonably be questioned.

Prior association with a party "does not, in itself, form a reasonable basis for questioning a judge's impartiality." Sierra Club v. Simkins Indus., 847 F.2d

1109, 1117 (4th Cir. 1988) (citations omitted), cert. denied, 491 U.S. 904 (1989). "Litigants are entitled to a judge free of personal bias, but not to a judge without any personal history before appointment to the bench." 847 F.2d at 1117.

We disagree, as a factual matter, with the Doyles' assertion that the judge was a member of the school board during a period of time "relevant to the dispute between the parents and Arlington Public Schools." Judge Hilton was a member of the Arlington School Board from 1980 through some time in 1984. The disputed facts in this case involve the years 1988-89. The only matter that dates back to 1984 is a stipulation by the parties that in 1984, the Doyles and the Arlington County school system agreed on an IEP which provided for Mairin's education at Taylor Elementary and that the Doyles decided instead to place Mairin at the [*6] Lab School of Washington. There was no dispute between the parties until June 29, 1988, when the Doyles asked that the Arlington schools pay for Mairin's education at the Lab School. Therefore, since Judge Hilton terminated his position as a member of the school board in 1984, prior to the arising of the dispute, and it not being shown that he knew anything about the facts or people involved, his impartiality may not reasonably be questioned. The district judge did not err in denying the Doyles' request that he disqualify himself under 28 U.S.C. @ 455(a).

Next, we must determine what level of deference should be given to the administrative findings. Generally, in reviewing state administrative decisions in IDEA cases, courts are required to make an independent decision based on a preponderance of the evidence, while giving due weight to state administrativ proceedings. Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982); Spielberg v. Henrico County Pub. Sch., 853 F.2d 256, 258 (4th Cir. 1988), cert. denied, 489 U.S. 1016 (1989); Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 981 (4th Cir. 1990) [*7] (The reviewing court "makes a bounded, independent decision -- 'bounded by the administrative record and additional evidence, and independent by virtue of being based on a preponderance of the evidence before the court.'") (quoting Town of Burlington v. Massachusetts Dep't of Educ., 736 F.2d 773, 791 (1st Cir. 1984), aff'd sub nom. Burlington School Comm. v. Massachusetts Dep't of Educ., 471 U.S. 359 (1985)).

The statements we have just quoted have come about by virtue of the plan for administrative and judicial review of decisions of local school boards with respect to the education of handicapped children. 20 U.S.C. @ 1415 (b)(2) provides in general that when parents or guardians have a complaint with respect to a decision under the statutes, they are entitled to an impartial due process hearing conducted by the state education agency or by the local education agency, as determined by state law, which shall not be conducted by an employee of the agency involved. Section 1415(c) provides that if any such hearing is conducted by the local education agency, an aggrieved party has a right to appeal to the state education agency which shall conduct [*8] an impartial review. The officer conducting such review shall make an independent decision. Section 1415(e)(2) provides that a party aggrieved by an administrative decision of the state agency may bring an action in a United States district court or a state court of competent jurisdiction, in which case the court "shall receive the records of the administrative proceedings, shall hear additional evidence the request of the party, and, basing its decision on the preponderance of th evidence, shall grant such relief as the court determines as appropriate." With that in mind, Virginia has enacted Va. Code @ 22.1-214, which provides in subsection B that the State Board of Education shall prescribe procedures to [illegible]ord due process to handicapped children and their parents or guardians under the federal statute, as well as to school divisions. Subsection C provides that the State Board of Education may provide for final decisions to be made by a hearing officer. Subsection D provides for aggrieved parties to bring their suits in court and is parallel to 20 U.S.C. @ 1415 (e)(2) above mentioned. Pursuant to this statute, the State Board of Education has promulgated Regulations Governing [*9] Special Education Programs for Handicapped Children and Youth in Virginia. Section 3.5 of the Regulations is entitled "Procedural Safeguards" which govern hearings and appeals. Section 3.5(A)(5) provides that upon request, dissatisfaction with a local school board decision will be heard by a hearing officer appointed according to the Hearing Officer System of Rules of Administration Promulgated by the Supreme Court of Virginia, and subsection (10)(j) provides that a decision by the hearing officer is final unless appealed. Subsection (11) provides for an administrative appeal to the state agency which is conducted by a hearing officer from the same pool of officers, and subsection (11)(b) provides that the decision by that hearing officer is final. Thus, unlike some systems of administrative review we encounter, the administrative authorities are bound by the decisions of their hearing officers. n2

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n2 Va. Code @ 9-6.14:14.1 provides that the Executive Secretary of the Supreme Court will prepare a list of qualified hearing officers who are then assigned to cases in rotation by the Executive Secretary.

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[*10]
With this system for administrative and judicial review in mind, the question is how we apply the due weight requirement of Rowley. The local hearing officer in this case examined the historical facts with respect to disability with some care, as well as the statutory requirements. The reviewing officer for the State Board of Education did not do the same but stated that he would have found the same facts on the same evidence. The only point on which the local and state hearing officers differed in any consequence was in the credibility of one of the witnesses for the plaintiffs, unless it may be said they differed on who had the burden of proof. n3 That witness was a Dr. Solomon, who was a teacher at the Lab School and had observed Mairin's current class at the Lab School as well as the proposed class at Nottingham. She testified that Mairin was one of the most, if not the most, complex learning disabled children she had ever encountered and that, in her opinion, a highly individualized program such as Lab's was the only methodology which would suffice for Mairin. Without stating any reason other than the heading of a report which Dr. Solomon had prepared and called "The Appropriate [*11] Program: The Lab School of Washington" and that Dr. Solomon had stated that, in her opinion, a highly individualized program was the only methodology which would suffice for Mairin, the reviewing officer concluded that Dr. Solomon saw her role as that of an advocate and found her testimony not to be credible. While it is true that by statute and regulation the reviewing officer is required to make an independent decision, we are of opinion that his reason for discrediting a witness who he had not seen or heard testify, in the face of the crediting of that same witness by a hearing officer [illegible] had seen and heard the witness testify, is so far from the accepted norm of a fact-finding process designed to discover truth that we think the due weight which should be accorded the decision of the reviewing fact-finding officer depending on that credibility decision is none. For example, F.R.C.P. 52(a)

provides that ". . . due regard shall be given to the opportunity of the tria co t to judge of the credibility of the witnesses." And we have held that "We may not reverse a trier of fact, who had the advantage of hearing the testimony, on the question of credibility." McCrary v. Runyon, 515 F.2d 1082, 1086 (4th Cir. 1975), [*12] aff'd, 427 U.S. 160 (1976). See also Federal Practice and Procedure, Wright and Miller, (1971), Civil @ 2586. While federal law governs this aspect of the construction of this federal statute, we note that Virginia law on the credibility of witnesses as applied in Virginia courts is to the same effect. See Trayer v. Bristol Parking, 198 Va. 595, 597, 95 S.E.2d 224, 226 (1956); Va. Code @ 8.01-680.

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n3 This point, however it might be decided, does not affect our decision.

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The First and District of Columbia Circuits have examined the question of due weight. In Town of Burlington, the court criticized the district court for having given the administrative findings the prima facie effect of a master's findings. That court similarly stated that fact-findings are not binding on the court even if supported by the traditional substantial evidence test. The court also stated that "weight due the administrative findings of fact must be left to the discretion of [*13] the trial court" and that the trial court "must consider the findings carefully and endeavor to respond to the hearing office[illegible] resolution of each material issue." Apparently, the First Circuit would requi[illegible] such a response by the district court, both to findings of fact and conclusions of law of the hearing officer. 736 F.2d at 791-792. In Kerkam v. McKenzie, 862 F.2d 884 (D.C. Cir. 1988), the court took the district court to task for its unexplained preference for the conclusions of those who opposed the hearing officer's view and stated that it remanded "for the district court to directly tackle the issue of whether the plaintiffs' showing is enough to overcome the hearing officer's conclusion that the program offered at Mamie D. Lee was 'appropriate' as that term is used in @ 1412(1)." 862 F.2d at 889. Since the Supreme Court had held in Rowley that whether or not a program is appropriate is a matter of fact, we think the holding of Kerkam is very close to, if not directly, one that findings of fact by a hearing officer made in a regular manner and with evidentiary support are entitled to presumptive validity, otherwise [*14] there would be nothing to overcome. The District of Columbia Circuit thus would give greater validity than does the First Circuit to the administrative fact-finding of the hearing officer or officers.

More in line with the view of the District of Columbia Circuit, we think that findings of fact by the hearing officers in cases such as these are entitled to be considered prima facie correct, akin to the traditional sense of permitting a result to be based on such fact finding, but not requiring it. See New York Transit Authority v. Beazer, 440 U.S. 568, 587, n.31 (1979).

We are further of opinion that when fact-findings are regularly made and entitled to prima facie correctness, the district court, if it is not going t[illegible] follow them, is required to explain why it does not. This holding is consiste[illegible] both with Town of Burlington, 736 F.2d at 792, and Kerkam, 862 F.2d at 889. After giving the administrative fact-findings such due weight, if any, the district court then is free to decide the case on the preponderance of the evidence, as required by the statute.

Again, in deciding what is the due weight to be given [*15] an administrative decision under Rowley, we think a reviewing court should examine the way in which the state administrative authorities have arrived at their administrative decision and the methods employed. When a state administrative appeals authority has departed from the fact-finding norm to such an extent as here, we think the facts so found as a result of that departure are entitled to no weight, but the facts as found by the local hearing officer are entitled to prima facie correctness.

In the case at hand, both the review officer and the district court failed to consider relevant findings of fact made by the hearing officer that a move from the Lab School would have an adverse effect on Mairin; n4 it "would be impossible for Mairin to receive benefit at Nottingham"; n5 "Mairin requires an abnormally high degree of one-to-one instruction and integration of related services into her daily schedule" and "Nottingham . . . is plainly not set up to provide this level of service"; "Nottingham is simply not equipped to provide" classes in Mairin's "areas of reactive strength"; and, Mairin cannot appropriately handle Nottingham's approach. Without considering these findings, [*16] both the review officer and the district court reached results plainly irreconcilable with them.

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n4 The relevant excerpt from the hearing officer's opinion follows:

[illegible] witnesses who testified on behalf of the Doyles expressed grave concern as to the adverse effect any move to a new school and a new environment would have on her. This was, however, a calculation that did not appear to be a matter of concern to any of the witnesses for [Arlington Public Schools] who testified. . . .

The teachers and other professionals at the Lab School who know Mairin (e.g., Dr. Jeanne Johns, Ms. Marla Braxier, Ms. Laura Solomon) were unanimous in expressing their concern about any move from the Lab School at this time. Their views are entitled to great weight. . . . From the foregoing it is the conclusion of the Hearing Officer that the record does not support the contention of [Arlington Public Schools] that the proposed change in the site of Mairin's schooling is supported by the record.

n5 The relevant portion of the hearing officer's opinion follows:

It appears that [Arlington Public Schools'] position is that, since its IEP and the ensuring [sic] placement of Mairin at Nottingham would meet some of Mairin's needs, she would receive some benefit from the [Arlington Public Schools'] plan. The implication is that whatever the degree of benefit would be, however minimal, it would meet the Rowley standard. This is simply not true. The fact that Nottingham has certain services which Mairin must have does not make the plan appropriate. As Counsel for the Doyles argues in his brief:

[Mairin] has repeatedly demonstrated that she requires all of her services to be delivered as part of a total, self-contained structure if she is to benefit from any of them. It is clear that Mairin's level of frustration and dysfunction that she has exhibited in the past would render it impossible for her to receive benefit at Nottingham. As her mother stated when on the stand:

I don't know how you would predict, but my suspicion would be that without the intensive instruction and a drop in student-teacher ratio that the frustration level would build, the self-esteem would fall, and the social problems would increase and worsen.
[*17]

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In order to receive benefits under the IDEA, a State must demonstrate that all children with disabilities in its educational programs have "the right to a free appropriate public education." 20 U.S.C. @ 1412 (1). The IDEA requires that the education of each disabled child be tailored to the needs of that child by means of an "individualized education program" (IEP). One of the determinations to be made by a reviewing court in IDEA cases is whether the IEP will give the child a free appropriate education. The "free appropriate public education" requirement is satisfied when a State provides the handicapped child with "personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction." Board of Education v. Rowley, 458 U.S. 176, 203 (1981); see also In re Conklin, No. 89-2220, F.2d , slip op. at 14 (4th Cir. 1991). The factual findings we have mentioned above in some detail are among those not considered by the district court and which go directly to the question of whether Arlington's IEP would give Mairin [*18] an appropriate education. Failure to consider those factual findings is reversible error.

On remand, the district court must reconsider its decision and give due weight to the state administrative findings. The court should address each such relevant factual finding made by the hearing officer and explain why, under the due weight standard, it has chosen to accept or not accept that finding. n6

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n6 On remand, the district court will have an opportunity to, and should, reconsider its opinion, including its decision, contrary to that of the hearing officer, that the Arlington County School Board had complied with the procedural requirements of the IDEA.

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The judgment of the district court is

AFFIRMED IN PART, VACATED IN PART, AND REMANDED WITH INSTRUCTIONS.

5TH CASE of Level 2 printed in FULL format.

BOARD OF EDUCATION OF COMMUNITY CONSOLIDATED SCHOOL
DISTRICT NO. 21, COOK COUNTY, ILLINOIS, Plaintiff-Appellant,
v. ILLINOIS STATE BOARD OF EDUCATION, DOUGLAS C. CANNON
and SHELDON and PAULINE BROZER on behalf of ADAM BROZER,
Defendants-Appellees

No. 90-3599

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

938 F.2d 712; 1991 U.S. App. LEXIS 16108

May 28, 1991, Argued
July 23, 1991, Decided

SUBSEQUENT HISTORY: Rehearing and Rehearing En Banc Denied August 21, 1991, Reported at 1991 U.S. App. LEXIS 19321.

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 90 C 3087; George W. Lindberg, Judge.

COUNSEL: Marian C. Haney, Eugene G. Bruno, Fay Hartog-Rapp, Joan E. Gale, SEYFARTH, SHAW, FAIRWEATHER & GERALDSON, Chicago, Illinois, for intiff-Appellant.

Mary Ellen Coghlan, AAG, OFFICE OF THE ATTORNEY GENERAL, Chicago, Illinois, Michael D. Gerstein, Chicago, Illinois, for Defendants-Appellees.

JUDGES: Cummings, Wood, Jr. and Flaum, Circuit Judges. Wood, Jr., Circuit Judge, dissenting.

OPINIONBY: CUMMINGS

OPINION: [*713] CUMMINGS, Circuit Judge

Adam Brozer is a fifteen-year-old junior high school student who is handicapped primarily by a behavior disorder and also by a learning disability. In this appeal, brought pursuant to the Education of the Handicapped Act, 20 U.S.C. @ 1400 et seq. ("EHA"), n1 the sole issue is whether the district court erred in affirming an order of the Illinois State Board of Education directing that Adam be placed in a private day school near his family's residence in Wheeling, Illinois.

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n1 1990 amendments have renamed the EHA. It is now the Individuals with Disabilities Education Act. See Pub.L. No. 101-476, 104 Stat. 1141.

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[2]

BACKGROUND

Adam was first identified as behavior disordered in May 1986. His school district, here the plaintiff, recommended that Adam be placed in the Student Support Center ("SSC") of the Kilmer School, a public school in Buffalo Grove, Illinois. Adam's parents acquiesced in the recommendation after initially resisting, and Adam was placed in an educational program run through the SSC at Kilmer.

From February 1987 through the end of the 1988-1989 school year, Adam progressed moderately, receiving grades in the "B" to "C" range. Adam's classroom teacher provided extensive services for his behavior disorder in the 1988-1989 school year, but his behavior deteriorated. He was at times disruptive and violent. The district became concerned that adequate support services would not be available to Adam the following year at Holmes Junior High School in Wheeling. After holding a multi-disciplinary staff conference in February 1989 to discuss appropriate placements, the district recommended that Adam be placed at the Behavior Education Center at Jack London School, also in Wheeling ("BEC/Jack London"). BEC/Jack London is an alternative public school for students who suffer mainly from severe [**3] behavioral disorders.

In May 1989 another multi-disciplinary staff conference was held to formulate the "individualized educational program" or [*714] IEP, required under the EHA. See 20 U.S.C. @ 1401 (a)(18). Again the district recommended the BEC/Jack London placement. The Brozers objected, preferring that Adam be placed at the Student Support Center at Holmes Junior High. The district deferred, and Adam started junior high school at Holmes in the fall of 1989.

At Holmes, Adam's behavior worsened rapidly. One of his teachers described him as "out of control," and he was failing all of his first semester classes. Because the Brozers withdrew their consent for Adam to be disciplined in school or to receive social services, Adam's teachers could not as easily intervene to teach Adam to behave responsibly.

On November 11, 1989, at a third multi-disciplinary staff conference, the MDC team concluded that Adam's placement at Holmes was failing to meet his educational needs. The district again recommended a more restrictive placement for Adam at BEC/Jack London. When Adam's parents refused to consent to this placement, the district initiated the informal due process review procedure established by [**4] 20 U.S.C. @ 1415 (b)(1)(E) to determine the appropriate placement for Adam.

The Level I (local review) hearing was held on February 23 and 28, 1990. Adam's parents opposed the BEC/Jack London placement on the grounds that because Adam was not mainly behavior disordered, the BEC/Jack London facility did not suit his needs. The Level I hearing officer agreed with the district that Adam was primarily behavior disordered and only secondarily learning disabled. The hearing officer also noted the "irreconcilable differences" that had developed between the Brozers and the district. She listed actions taken by the Brozers which impeded the district's efforts to aid Adam's education. Among these were: 1) the parents' refusal of support services for Adam; 2) the parents' refusal to supply Adam's medical history to his school; 3) the parents' refus[illegible] to allow detention or quiet lunches to be used as intervention strategies for Adam; 4) the fact that the parents had made derogatory comments about school staff members in Adam's presence, with the effect of undermining the school's cational programs. In light of these problems, the Level I hearing officer und that Adam's education could only [**5] "be effectuated if the parents are not involved on a continuous basis in second guessing * * * the disciplinary efforts of the educators." To this end she ordered that Adam be enrolled, not at BEC/Jack London, but at public expense at a private residential school, the Arden Shore Residential Educational Facility in Lake Bluff, Illinois. The hearing officer ordered that Adam be placed at BEC/Jack London until Arden Shore could accommodate him.

The Brozers appealed the Level I decision and order, requesting at the Level II (the state educational agency) hearing that Adam be placed either at Holmes or at a private day placement closer to home than Arden Shore. The Level II officer, like the Level I officer, noted the extremely adversarial relationship between the Brozers and the district, likening the Brozers' mindset to a "siege mentality." He agreed that "the state of mind of the parents [was] likely to affect the success or failure of the District's proposed placement at Jack London School." In fact, he stated that because the district's proposed placement had been "poisoned" in Adam's mind by his parents, there was "no reason to expect that the [BEC/Jack London] placement will be [**6] successful." The Level II officer thus concurred in the district's judgment that Adam needed a more restrictive placement than Holmes. However, he felt the Level I officer had not upheld her obligation to order the least restrictive placement that would still meet Adam's needs. See 20 U.S.C. @ 1412 (5). Specifically he did not feel that the evidence supported the Level I officer's finding that Adam needed to be enrolled at a private residential school. He ordered the school strict to find Adam a placement at a private day school within 30 minutes muting distance from the Brozers' residence or within 10 miles from the edge Adam's school district.

The school district appealed to federal district court pursuant to 20 U.S.C. @ 1415 (e)(2). It contended that the Level II [*715] hearing officer erred in considering the Brozers' hostility to the BEC/Jack London placement as a part of his analysis of whether BEC/Jack London was an appropriate placement under the EHA. It requested an order placing Adam at BEC/Jack London. The district court entered summary judgment affirming the Level II hearing officer's order, and the school district appealed to this Court. n2

-------------------Footnotes-------------------

n2 Defendants note that our jurisdiction is doubtful because the district court left a counterclaim asserted by the Brozers unresolved. A pending counterclaim ordinarily prevents a judgment from being final and thus precludes appeal. In re Berke, 837 F.2d 293 (7th Cir. 1988). However, if it is clear that the work of the district court is finished, a notice of appeal can be effective in spite of formal difficulties in the judgment. See Trzcinski v. American Casualty Co., 901 F.2d 1429, 1431 (7th Cir. 1990). Here the parties have represented that they have settled the counterclaim and thus we find appellate jurisdiction.

-------------------End Footnotes-------------------

[**7]

ANALYSIS

The Education for the Handicapped Act provides federal funds to assis states in educating handicapped children. To receive funds, a state must provide each handicapped child with a "free appropriate public education" tailored to his or her needs by an "individualized educational program." n3 The Supreme Court has defined a "free appropriate public education" as one which guarantees a reasonable probability of educational benefits with sufficient supportive services at public expense. See Board of Education v. Rowley, 458 U.S. 176, 188-189, 73 L. Ed. 2d 690, 102 S. Ct. 3034 . A two-part test is used to evaluate a state's compliance with the mandates of the EHA:

First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

Rowley, 458 U.S. at 207. If the state has satisfied the procedural requirements of the EHA and the program developed by the state is designed to enable the handicapped child to receive educational benefits, the courts can require no more. The purpose of the EHA is to "open [**8] the door of public education" to handicapped children, not to educate a handicapped child to his or her highest potential. Id. at 192.

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n3 The state of Illinois has established a set of procedures parallel to those contained in the EHA to ensure that it meets the requirements of the Ac Compare 20 U.S.C. @ 1401, 1415 with Ill. Rev. Stat. ch. 122 paras. 14 -1.02, 14 -8.02. The school district's appeal is based on Illinois state law as well as on the federal statute. We will not engage in a separate analysis of the state law claim.

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The issue on appeal is narrowly focused on the second of the two questions posed in the Supreme Court's test. The parties now agree on the proper characterization of Adam's handicaps. The state has complied with the procedures set forth in the EHA. The question is simply whether the BEC/Jack London placement recommended by Adam's school district was inappropriate for Adam and whether the private day placement ordered by the Level II hearing officer is indeed reasonably calculated [**9] to be of educational benefit to Adam.

Because judges are not trained educators, judicial review under the EHA is limited. When reviewing outcomes reached through the administrative appeals procedures established by 20 U.S.C. @@ 1415 (b) and (c), a district court can hear additional evidence and "make an independent decision as to whether the requirements of the act have been satisfied * * * based on a preponderance of the evidence." Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 293 (7th Cir. 1988), certiorari denied, 488 U.S. 925, 102 L. Ed. 2d 327, 109 S. Ct. 308 . However, it must give "due weight" to the results of those proceedings, id., bearing in mind not "to substitute [its] own notions of sound educational policy for those of the school authorities which they review." Rowley, 458 U.S. at 2 At the Court of Appeals level, we view the question of whether an IEP is adequate and appropriate as a mixed [*716] question of law and fact, and thus review the district court's ultimate determination de novo. But in the ence of a mistake of law, the district court's answer to this mixed fact/law question is only reviewable for clear error. See Roland M. v. Concord School Comm., 910 F.2d 983, 990-991 (1st Cir. 1990), [**10] certiorari denied, 113 L. Ed. 2d 230, 111 S. Ct. 1122 ; Wexler v. Westfield Bd. of Educ., 784 F.2d 176, 181 (3rd Cir. 1986), certiorari denied, 479 U.S. 825, 93 L. Ed. 2d 49, 107 S. Ct. 99 . In this appeal, the school district bears the burden of proof as the party challenging the outcome of the state administrative hearings. See Karl v. Board of Education, 736 F.2d 873, 877 (2nd Cir. 1984); Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 624 (6th Cir. 1990).

The district court applied the correct legal standard in affirming the decision of the Level II hearing officer ordering Adam to be placed in a private day school rather than at BEC/Jack London. A school district has met the substantive requirements of the EHA if its proposed placement is reasonably calculated to be of educational benefit to the handicapped child. The district judge properly kept this question foremost in his mind, as had the hearing officers before him. He ultimately concurred in the opinions of the Level I and Level II hearing officers that Adam "would not be able to satisfactorily obtain the required education benefits from the District's proposed placement in light [**11] of the history of Adam's and his parents' relationship with the District." Bd. of Educ. of Community Consolidated School Dist. 21 v. Ill. State Bd. of Educ., No. 90 C 3087, 1990 U.S. Dist. LEXIS 14220 (N.D.Ill. Oct. 22, 1990) (memorandum opinion and order) (emphasis supplied). After finding that the BEC/Jack London placement would not be of sufficient educational benefit to Adam to meet the requirements of the EHA, the court considered the remaining options: private day placement and private residential placement. The court found licitly that "placement in a private day-school facility is necessary at this e in order for Adam to obtain the educational benefit mandated by the [EHA]." Id. The court chose the day school option because it was the "least restrictive placement" from which Adam could receive educational benefit. See 20 U.S.C. @ 1412 (5) (expressing preference that "to the maximum extent appropriate," handicapped children not be removed from regular educational environment).

The school district argues that it was improper as a matter of law for the district court to consider the Brozers' hostility to the BEC/Jack London placement in analyzing the educational benefits which could be expected [**12] to flow from that placement. This contention is incorrect. The sole legal requirement is that the IEP be designed to serve the educational interests of the child. The EHA does not limit the factors that can be considered in judging the likely impact of the IEP on the child so long as they bear on the question of expected educational benefits. In this case the district court made a factual finding that the parents' attitudes were severe enough to doom any attempt to educate Adam at BEC/Jack London. This finding had obvious and direct relevance to any assessment of the probable benefit to Adam of the BEC/Jack London placement. The court only considered the Brozers' attitude to the extent that it related to the ultimate question of whether the court could deem the BEC/Jack London placement to be "reasonably calculated" to supply educational benefit to Adam. The district court's factual findings were not clearly erroneous and it applied the proper legal standard to those facts.

The school district believes that our previous holding in Lachman, 852 F.2d 90, precluded the district court from considering the Brozers' hostility to school district's proposal. In [**13] Lachman we wrote that parents:

do not have a right under the [EHA] to compel a school district to provide a

> specific program or employ a specific methodology in providing for the education of their handicapped child.

Lachman, 852 F.2d at 297, citing Rowley, 458 U.S. at 207. The [*717] district contends that because Lachman found parental preference to be an invalid criterion by which to judge an IEP, we cannot allow any consideration of the Brozers' opposition to the BEC/Jack London placement in determining whether it passes muster under the EHA.

Lachman does not prevent any consideration of parental hostility. Lachman holds that a state-proposed IEP which meets the substantive requirements of the EHA cannot be defeated merely because the parents believe a better educational program exists for their child. Lachman involved a dispute between parents and a school district over how best to educate a deaf child. The parents favored a "cued speech" methodology aimed at training the child to understand spoken language. The district recommended a "total communication" approach in which the child would have relied primarily on sign language. [**14] The district court explicitly found that the school district's proposed placement "had complied with the Act," 852 F.2d at 297, meaning that the total communication approach promised educational benefits to the child. In the face of this finding, the parents could not force adoption of what they perceived to be an even more effective educational program. Id.; accord Roland M., 910 F.2d at 993 (issue is whether school district's IEP struck an adequate and appropriate balance, not whether better or worse program existed); Gregory K. v. Longview School Dist., 811 F.2d 1307, 1314 (9th Cir. 1987) (appropriate placement proposed by school district must be upheld even if family prefers another alternative). The school district had done all that the EHA required.

In this case, unlike Lachman, the district court and the hearing officers found that the school district's proposal simply would not meet the EHA requirement that the IEP be calculated to benefit Adam, because Adam's parents had already "poisoned" the option in Adam's mind. The district judge did not elect one alternative over another viable alternative based on the [**15] parents' preferences. The school district's proposed IEP was not acceptable or appropriate under the EHA, because the state of relations between the Brozers and the Board guaranteed its failure. Once it found that the district-proposed IEP would not benefit Adam, the court could not order its implementation under the EHA.

Lachman aside, n4 the district's larger point is well taken. Allowing a consideration of parental hostility to a state-proposed IEP to the extent that it limits the IEP's benefit to the child will result at times in the rejection of the school district's proposal simply because the parents, perhaps irrationally, oppose it. The plaintiff school district here exhorts us not to adopt a position that will "reward" parents for aberrant or distasteful behavior. Under the EHA, however, our concern is not rewarding or punishing parents. The appropriate concern is finding a program which will be of educational benefit to the child. Were we to adopt the school district's position and hold that parental attitudes can never be considered even if they have impaired the workability of the IEP for the child, this would in effect be punishing children for the actions of their [**16] parents. A child whose parents oppose an IEP so vehemently and vocally as to "doom" its prospects should not be enrolled in the placement merely to enable educational agencies and federal courts to "discipline" parents. The EHA makes clear whose interest must be paramount.

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n4 The other cases cited by the school district are inapposite. Cain v. Yukon Public Schools, Dist. I-27, 775 F.2d 15 (10th Cir. 1985), and Roland M. v. Concord School Comm., 910 F.2d 983 (1st Cir. 1990), deal with the circumstances under which parents' actions may disqualify them from challenging the state's compliance with procedural requirements of the EHA. Doe v. Defendant I, 898 F.2d 1186 (6th Cir. 1990), merely emphasizes that an IEP is evaluated prospectively and not in hindsight under the EHA. An IEP reasonably calculated to benefit the child cannot later be deemed inappropriate simply because of attempts by the parents after implementation to thwart its success. Doe says nothing about a case in which parental opposition is anticipated at the outset to make benefits to the child impossible. Evans v. District No. 17, 841 F.2d 824 (8th Cir. 1988), holds that parents cannot complain about the substantive adequacy of an IEP if they remove their child from the school district without requesting an IEP.

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[**17]

[*718] Moreover, we do not share the school district's concern that under our ruling parents will be able to feign opposition to obtain their preferred placement. Our ruling does nothing to alter the ability of hearing officers to make credibility determinations in the first instance. Hearing officers are best positioned to assess whether a family's hostility is manufactured or whether parental attitudes pose a real threat to the success of the proposed IEP. Their findings are thus entitled to "due weight" by a district court on appeal. Under the regime established by the EHA, the district courts also retain the ability to test the parents' sincerity if it remains a viable issue on appeal to federal court, for they are allowed to hear additional evidence at either party's request. See 20 U.S.C. @ 1415 (e)(2). This Court is obligated to give any factual finding that emerges from this process deferential "clear error" review, whether the district court finds that the parents' obstructionist attitude will have little real effect on the child's education or, as in this case, that the parents' hostility is so entrenched as to preclude hopes for the proposed IEP. n5

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n5 The dissent simplifies the disagreement in this case by characterizing it as one "between parents and the school district," see infra [Slip Op.] at 13, implying that the district judge and the majority here have sided with the parents and wholly against "school authorities." Id. The Illinois State Board of Education is a defendant here with the Brozers. It is worth reiterating that two educational authorities, the hearing officers employed and trained by the Illinois State Board of Education to preside over administrative appeals, see Ill. Rev. Stat. ch. 122 para. 14-8.02(g), found the proposed IEP incapable of conferring educational benefits prior to the district judge's ruling, and that we and the district judge have come to the same conclusion partly in deference to that finding and their expertise.

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[**18]

We conclude that it is permissible to consider parental hostility to an I[illegible] as part of the prospective evaluation required by the EHA of the placement's expected educational benefits. If the facts show that the parents are so opposed to a placement as to undermine its value to the child, there is no obligation under the EHA to order the placement. The district court rightly held that the BEC/Jack London placement did not meet the substantive standard set by the EHA and that the IEP ordered by the Level II hearing officer is the least restrictive placement that will be of educational benefit to Adam. n6

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n6 The propriety of Adam's temporary private day placement in the Jeanne Schultz Memorial School in Park Ridge, Illinois, pending the resolution of this appeal is not at issue and we express no opinion thereon.

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The judgment of the district court is affirmed.

DISSENTBY: WOOD, JR.

DISSENT: WOOD, JR., Circuit Judge, dissenting.

The majority opinion fairly sets forth the problem in this case, but I respectfully differ as to the result reached, [**19] and would reverse.

The Brozers, parents of Adam, have succeeded in dictating the educational result by their continued and extremely hostile attitude toward the plaintiff district board and its efforts in behalf of Adam. The district board is primarily responsible for Adam's development and education. The Brozers have been more disruptive of the educational process than has Adam, but Adam has serious problems that require and deserve specialized attention. Parents' concern for their children is, of course, understandable, commendable, and important and ordinarily deserves consideration by school authorities. In this case, however, parental involvement and obstruction have exceeded all reasonable bounds. There is no basis whatsoever to default the good faith and competent professional efforts and recommendations of plaintiff designed to serve the best educational interests of Adam. There is not the slightest evidence of any legal or educational failure by plaintiff. There is not the slightest evidence that its proposed placement for Adam was improper or would not have met the goals and objectives under the applicable laws.

The majority reminds judges that we are not trained educators. [**20] We are not trained, however, in many things that we must pass on in some respect, but we need not be. I [*719] do not need to be a professional educator to see that educational decisions and responsibilities have been improperly surrendered to the Brozers who are not trained educators either. The plaintiff has carefully, considerately, and professionally sought to aid Adam only to be thwarted by the Brozers. n1 If the parents had not so vehemently and continually obstructed their child's special education there might be much less of an educational or behavioral problem now.

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n1 One hearing officer made a factual finding that in the recent past the Brozers had temporarily rewarded their disturbed son for something he had done by giving him a gun.

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The requirements of Board of Education v. Rowley, 458 U.S. 176, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982), were fully satisfied by plaintiff. The necessary procedures were followed and the individual educational programs developed by plaintiff for Adam were reasonably calculated to enable Adam to receive [**21] educational benefits. Those programs should have been given a chance. The Brozers, as it is, have been allowed what is in effect an absolute veto over the plaintiff's proposed educational program. I would follow the general principles we set forth in Lachman v. Illinois State Board of Education, 852 F.2d 290 (7th Cir.), cert. denied, 488 U.S. 925, 102 L. Ed. 2d 327, 109 S. Ct. 308 (1988), another case in which there was a disagreement between parents and the school district. The parents in this present case have carried parental involvement to an extreme far beyond all reasonable bounds. To approve of this unreasonable parental interference will precedentially cause school authorities additional future problems they do not need.

The Brozers should have stepped aside and supported, not disrupted, plaintiff's careful efforts for their child's education. By their unreasonable interference and obstruction the Brozers have gained control over the educational process. The majority approves, but I cannot. n2 I respectfully dissent.

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n2 In view of footnote 5 of the majority opinion some clarification is needed.

The defendant Illinois State Board of Education filed an answer in the district court in which to the substantive issues it pleaded either lack of personal knowledge, or it deferred to the administrative record. However, in an affirmative defense the state board alleges its only obligation is to appoint an impartial hearing officer, which it did. The state board also explicitly alleges that it has "no interest or position regarding the merits or the underlying dispute between the parties." It appears the state board also views this controversy as one between the district and the parents. In this court the state board did not file a brief or appear at oral argument nor did the Level II hearing officer, Douglas C. Cannon, also named as a defendant. This is an appeal by the plaintiff district from the decision of the Level II hearing officer, Mr. Cannon, who deferred to the Brozers. So it is that I view this case in reality as a case between the Brozers and the district board regardless of whom plaintiff named as defendants.

The Level II hearing officer stated that he could "in no way condone the parents' conduct in this matter which can be described at best as being obstructionist and undermining the efforts of the School District to assist their son," and further he found that the school district's proposed placement had been "poisoned" in the mind of the student by his parents. The Level II hearing officer also had his own problems with Mrs. Brozer as she expressed her displeasure at any adverse evidentiary ruling made against her counsel, and had to be admonished. That admonishment only reduced but did not eliminate the problem. The hearing officer characterized the Brozers as having a "siege mentality" which in no way could be charged to the district. However, the hearing officer unfortunately then went ahead and based his decision on the conduct of the Brozers. He did urge them to work with Adam's educators, not against them. It was, he said, their "last chance."

My only point is that the continually excessive obstructive conduct of the Brozers is not a valid reason to give in and do it their way. The district court carefully looked at and analyzed this difficult and unfortunate problem. I only differ with the result reached for the reason given. The district board, the hearing officers, the district court, and I all agree it was the parents' objectionable conduct which has forced this result. I simply would not approve of parental conduct as a legitimate basis for it. The district's careful plan should have been tried, but since that is not to be I hope that what is to be done for Adam will prove to be just what he educationally needs.

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[**22]

1ST CASE of Level 1 printed in FULL format.

THE BINGHAMTON CITY SCHOOL DISTRICT, Plaintiff v. RONALD AND ROSE BORGNA, Individually and as Parents of Rory Borgna and RORY BORGNA, Defendants

No. 90-CV-1360

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

1991 U.S. Dist. LEXIS 2565

March 5, 1991, Decided
March 6, 1991, Filed

COUNSEL: [*1]

COUGHLIN & GERHART, Attorneys for Plaintiff, CARL A. KIEPER, ESQ., OF COUNSEL, Binghamton, New York.

RONALD R. BENJAMIN, ESQ., Attorney for Defendants, Binghamton, New York.

JUDGES: Neal P. McCurn, Chief United States District Judge.

OPINIONBY: McCURN

[illegible]NION: MEMORANDUM-DECISION AND ORDER

I. Introduction

The Binghamton City School District ("District") seeks a preliminary injunction allowing it to modify the current educational placement of a handicapped student, Rory Borgna, pending the resolution of an administrative hearing on the proper placement for the student. The court granted a temporary restraining order on January 4, 1991, modifying Rory's placement, and conducted a hearing on a preliminary injunction on January 11, 1991. The court, with the consent of the parties to decide the merits of the District's request for a permanent injunction pending the administrative determination, granted judgment for the District. The following constitutes the court's findings of fact and conclusions of law in support of its ruling, pursuant to Fed.R.Civ.P. 52(a).

II. Education for the Handicapped Act

The Education for the Handicapped Act ("EHA" or "the Act"), 20 U.S.C. @ 1400 et seq., was enacted "to [*2] assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, [and] to assure that the rights of handicapped children and their parents or guardians are protected." 20 U.S.C. @ 1400 (c); Honig v. Doe, 484 U.S. 305, 108 S.Ct. 592, 596 (1988). The Act conditions federal financial assistance for school programs upon participating states' compliance with the substantive and procedural goals of the Act. Honig, 108 S.Ct. at 596-97. Accordingly, states [illegible]ing to qualify for federal funds must develop policies assuring disabled [illegible]dren the "right to a free appropriate public education," and must file with the Secretary of Education plans detailing the programs and procedures under which the policies will be effectuated. 20 U.S.C. @@ 1412 (1), 1413(a); Honig, 108 S.Ct. at 597. The states must, "to the maximum extent appropriate, "mainstream" disabled children, that is, educate them with children who are not disabled, and segregate or otherwise remove them from the regular classroom setting "only when the nature or severity of the handicap is such [*3] that education in regular classes . . . cannot be achieved satisfactorily." 20 U.S.C. @ 1412 (5); Honig, 108 S.Ct. at 597.

"The primary vehicle for implementing these congressional goals is the 'individualized educational program' (IEP), which the EHA mandates for each disabled child." Honig, 108 S.Ct. at 597. The IEP is to be developed in meetings between school representatives, the child's teachers, the parents or guardians of the child, and when appropriate, the child himself, and is required to include:

(A) a statement of the present levels of educational performance of such child,

(B) a statement of annual goals, including short-term instructional objectives,

(C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs,

(D) the projected date for initiation and anticipated duration of such services, and

(E) appropriate objective criteria and evaluation procedures and schedules f determining, on at least an annual basis, whether instructional objectives are being achieved.

20 U.S.C. @ 1401 (19). The IEP must be reviewed, and where necessary, revised [*4] at least once a year. 20 U.S.C. @ 1414 (a)(5).

The Supreme Court noted in Honig that Congress envisioned the IEP as the "centerpiece" for the states' provision of education to handicapped children, "and aware that schools had all too often denied such children appropriate educations without in any way consulting their parents, Congress repeatedly emphasized throughout the Act the importance and indeed the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness." Honig, 108 S.Ct. at 598. See 20 U.S.C. @@ 1400 (c), 1401(19), 1412(7), 1415(b)(1)(A), (C), (D), (E), and 1415(b)(2). As a result, the Act establishes procedural safeguards providing parents with an opportunity for input into decisions affecting their child's education and the right to seek review of those decisions. Parents are entitled to "examine all relevant records with respect to the identification, evaluation and educational placement" of the child; prior written notice of proposed changes or refusals to change the child's placement; an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or [*5] educational placement of the child; and an opportunity for an "impartial due process hearing" with respect to complaints. 20 U.S.C. @ 1415 (b)(1), (2); Honig, 108 S.Ct. at 598. Upon conclusion of the impartial hearing, the parents may seek further administrative review, and where the result is unacceptable, may fil civil action in state or federal court. 20 U.S.C. @ 1415 (c), (e)(2); Honig, 108 S.Ct. at 598. n1

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n1 For the analogous New York procedures, adopted pursuant to the requirements of 20 U.S.C. @ 1415, see N.Y. Education Law @@ 4402, 4404. Section 4404 provides, among other things, that if the recommendations of a school district's committee on special education are not acceptable to the child's parents, they may notify the board of education, which shall appoint an impartial hearing officer. Adverse determinations by the impartial hearing officer may be appealed to a review officer of the state Education Department. N.Y. Educ. Law @ 4404(1).

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At issue in the present case is the so-called "stay-put" provision [*6] of the EHA, which provides:

> During the pendency of any proceedings conducted pursuant to [section 1415], unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child. . . .

20 U.S.C. @ 1415 (e)(3). n2

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n2 The comparable provision in the New York Education Law states, in [illegible]tinent part:

> During the pendency of any proceedings conducted pursuant to [section 4404] and during the initial identification, evaluation, and placement procedure pursuant to this section and during the initial identification, evaluation and placement procedure pursuant to section forty-four hundred two of this article, unless the local school district and the parents or persons in parental relationship otherwise agree, the child shall remain in the then current educational placement of such child. . . .

N.Y. Educ. Law @ 4404(4).

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III. Background n3

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n3 Much of the following factual background is derived from the record presented in the companion case, Borgna v. Binghamton City School Dist., 90-CV-666. It is provided merely to place the issues presented upon the instant application for injunctive relief in context, however, and only the evidence presented on this application was considered by the court in making its ruling here.

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[illegible]

Rory Borgna is a nine-year-old boy in the third grade at the Roosevelt Elementary School in the District. Rory first enrolled in the District as a kindergarten student in September 1986. During the 1987-88 school year, Rory attended a "pre-first grade" class because his kindergarten teacher believed he needed specialized instruction. The District determined during that year that Rory's learning problems were continuing, and referred Rory's case to the District's Committee on Special Education ("CSE") n4 during the summer of 1988 to determine if he had a handicapping condition. The CSE, based upon review of a psychological evaluation of Rory, his academic history and progress, recommended that Rory be classified "learning disabled," and that he be placed in a regular first grade class for the 1988-89 school year, with speech therapy two times a week, and "resource room" services one period per day to address learning and behavioral problems. Rory's parents apparently consented to the classification and placement.

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n4 Each school district in New York is required to establish a committee on special education, composed of at least a school psychologist, a teacher or administrator of special education, a school physician, a parent of a handicapped child residing in the school district, and other persons the board of education or the board of trustees chooses to designate. The committee is required, among other things, to obtain, review and evaluate all relevant information pertinent to each child suspected of or identified as having a handicapping condition; to make recommendations to the school district and the child's parents based upon a written evaluation setting forth the reasons for its recommendations as to appropriate educational programs and placement for child, and as to the advisability of continuation, modification or termination of special class or program placements; and to provide prior written notice to parents when the committee plans to continue, modify or change the identification, evaluation, or educational placement of a child and to advise the parents of their opportunity to address the committee on the appropriateness of the committee's recommendations on program placements to be made to the school district. Certain school districts may also appoint subcommittees to assist the committee on special education. N.Y. Educ. Law @ 4402(1)(b)(1), (1)(b)(1)(b), (3).

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The District asserted, and the parents agreed, that Rory exhibited behavioral problems during the 1988-89 school year, such as tearing up papers, erasing the blackboard, pulling displays off the wall, and being otherwise disruptive. On June 1, 1989, after the close of the school year, the subcommittee on special education at the Calvin Coolidge Elementary School met to review possible changes in classification and placement for Rory. According to the District, when the members of the subcommittee mentioned a possible change in classification to "emotionally disturbed," the parents, who attended the meeting, became upset, and the meeting was adjourned. Another meeting of the subcommittee was conducted on June 9, 1989, which the parents also attended. The subcommittee then decided to refer the matter to the district-wide CSE.

The CSE determined that a new psychological evaluation of Rory would be needed to reevaluate Rory's classification and placement. The CSE attempted to schedule an evaluation by school psychologist John Long. According to the trict, however, Rory's parents were unavailable over the summer, and the aluation was not conducted. The CSE was thus unable to meet [*9] to consider Rory's placement and/or classification. Rory then began the 1989-90 school year in a regular second grade class, with speech, counseling and resource room services.

The CSE met again on September 13, 1989, to discuss Rory's classification and placement. The CSE determined that, without a new psychological evaluation of Rory, it could not recommend a change. Rory's parents did not attend the meeting, but had informed the CSE that they objected to a change in classification or placement, and to a new psychological evaluation. The parents maintained that Rory's previous psychological evaluation, conducted by Barbara Gilbert, should be used.

Despite the parents' objections, the District permitted Long to conduct two separate evaluations of Rory while he was in school in October and November 1989. However, because Rory was uncooperative during the evaluation sessions, Long was unable to make recommendations on an appropriate classification or placement. Rory continued to exhibit increased behavioral problems, and the CSE met on December 13, 1989, to consider alternatives to a change in placement or classification. The CSE recommended the assignment of a teacher's aide to remove [*10] Rory from the classroom setting when he became too disruptive and to work with him outside of class. The subcommittee met again on May 14, 1990, for its annual review of Rory's classification and placement, and decided again to refer the matter to the District CSE.

The CSE scheduled its meeting to review Rory's case for June 20, 1990. The rents applied to this court for, and were granted, a temporary restraining order adjourning that meeting, however, in order for the parents to assemble information they wished to present to the CSE for its consideration. At the same time the TRO was issued, the parents requested an impartial hearing concerning the use by the District of the evaluations performed by Long, thus precluding the District from changing Rory's classification or placement pending administrative review, pursuant to the "stay-put" provision in 20 U.S.C. @ 1415 (e)(3) and N.Y. Educ. Law @ 4404(4). n5

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n5 The parties have agreed that the action in which the parents sought the TRO is now moot, since the only relief the parents requested was the adjournment of the June 20, 1990, meeting. The only issue remaining in that action is a pending motion by the parents for attorney's fees.

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[*11]

As a result, Rory began the 1990-91 school year in a regular third grade classroom, with resource room services for one and one-half hours per day, speech therapy for two periods per week, counseling for one period per week, and the continued use of a teacher's aide. The District contends that Rory became increasingly disruptive and physically aggressive during the fall of 1990, essitating a review by the CSE to determine if Rory's placement should be nged. The District sent notice to the parents dated November 26, 1990, that a meeting of the CSE was scheduled for December 5, 1990, to review Rory's placement and program. The CSE met on that date and recommended that Rory's placement be changed from the regular third grade classroom to an "Option II class, comprised of a full-time special education teacher and full-time teacher's aide, with a maximum of 12 students per class (a regular third grade class has a maximum of approximately 27 students). Rory would receive speech therapy two times per week, and counseling two times per week. The recommendation of the CSE was approved by the District's board of education on December 11, 1990. On December 14, 1990, the parents requested [*12] an impartial hearing to review the change in placement, thus effecting the "stay-put" provision in 20 U.S.C. @ 1415 (e)(3), requiring that Rory remain in his current educational placement during the pendency of the administrative hearings.

The District then applied to the court for a TRO and a preliminary injunction permitting it to place Rory in the Option II program pending resolution of the administrative hearing. A TRO was granted to the District on January 4, 1991, upon a showing by the District that Rory's behavior presented a danger to himself, his fellow students, and his teachers, and that there existed at least sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in favor of the District. See Wallace Int'l Silversmiths, Inc. v. Godinger Silver Art Co., 916 F.2d 76, 78 (2d Cir. 1990) (citing Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979) (per curiam)). Instead of allowing Rory to be placed in the Option II program, Rory's parents enrolled him in Blessed Sacrament, a private parochial school, in early January.

An evidentiary hearing on the preliminary [*13] junction was scheduled for January 11, 1991. The issues on which evidence could be presented were limited by the court to (1) Rory's dangerousness and (2) whether, in balancing the hardships to the parties, there was a more appropriate interim placement for Rory than the Option II program, pending resolution of the administrative process.

IV. Discussion

A. Dangerousness

The language of 20 U.S.C. @ 1415 (e)(3) clearly states that during the pendency of administrative proceedings initiated under the EHA, unless the state or the local educational agency and the parents or guardian of a disabled child agree to a change, "the child shall remain in the then current educational placement." 20 U.S.C. @ 1415 (e)(3); Honig, 108 S.Ct. at 604. n6 The District contends, however, that Rory has become such a danger to himself, other students, and the faculty, that it can no longer keep him in a regular classroom. The District relies primarily on the Supreme Court's decision in Honig, the benchmark ruling on this issue.

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n6 The circumstances in the instant case raise the question whether the IEP approved for Rory by the board of education on December 11, 1990, or the prior IEP, was the "then current educational placement" when Rory's parents requested an impartial hearing on the board's decision. Neither the Act nor its accompanying regulations define the phrase "then current educational placement," but the Sixth Circuit recently stated that, "where school officials unilaterally attempt to change a child's instruction, the child's 'then current educational cement' will clearly be the previously implemented IEP," since the phrase nnotes preservation of the status quo - the operative placement actually functioning at the time the dispute first arises. Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 625-26 (6th Cir. 1990). Therefore, the "stay-put" provision applies here to Rory's IEP existing before the board's implementation of the new IEP.

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[*14]

In Honig, two students classified as emotionally disturbed were suspended indefinitely by the school district for violent and disruptive conduct, pending completion of administrative proceedings on the expulsions. The expulsions violated section 1415(e)(3), since they were "changes in placement" without the consent of the parents. The District, however, "faced with [the] clear directive" in section 1415(e)(3) that the students must remain in their current placement pending the administrative proceedings, asked the Court to read a "dangerousness" exception into the stay-put provision to allow the District to remove students it considered dangerous. Honig, 108 S.Ct. at 592. n7

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n7 It should be noted here that the majority in Honig only considered the stay-put provision as it applied to one of the students. The Court found that the case was moot as to the other student, since he was 24 years old at the time this case was presented. The EHA applies only to disabled children between the s of three and 21. Honig, 108 S.Ct. at 601-04.

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[*15]

The Court, upon reviewing the legislative history of section 1415, declined to recognize that exception. The Court noted in particular that, although interim placements were permitted if the parents and school officials could agree on them, there was no emergency exception for dangerous students incorporated in the language of the section. Id. at 604. It is clear, the Court held, "that Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school." Id. (emphasis in original).

The Court observed, however, that section 1415(e)(3) was not meant to operate inflexibly. The section does not preclude schools from using their normal procedures for dealing with children who endanger themselves or others, such as the use of study carrels, "timeouts," detention, or the restriction of privileges. Id. at 605. In addition, and pertinent to the case at bar, the Court held that school officials may apply to the federal courts for injunctive relief to remove a dangerous student from the regular classroom setting, pursuant to the authority vested in the court in section 1415(e)(2) to "grant such relief [*16] as the court determines is appropriate." Id. at 605-06; n8 see also Board of Educ. v. Kurtz-Imig, 16 E.H.L.R. 17 (N.D.Ill. 1989) (student enjoined from attending school until he ceased to be dangerous, or administrative process pleted, whichever occurred first, citing Honig); but see Cronin v. Bd. of c. of East Ramapo Cent. School Dist., 689 F.Supp. 197, 204-05, (S.D.N.Y. 1988) (preliminary injunction granted keeping student in current educational placement pending administrative determination where court found balance of hardships weighed in favor of student, and school district failed to demonst reason for removing student).

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n8 The Court observed that judicial review is not normally available under section 1415(e)(2) until all administrative proceedings have been completed, but that school officials and parents may by-pass the administrative review by showing it would be futile or inadequate. Honig, 108 S.Ct. at 606. In addition, the Court stated its opinion that the stay-put provision does not limit "the equitable powers of district courts such that they cannot, in appropriate cases, temporarily enjoin a dangerous child from attending school." Id. In the instant case, requiring the District to exhaust the administrative process, which could last several months, before seeking injunctive relief would not adequately provide for the immediate relief the District seeks. The court, in the exercise of its equitable powers, has allowed the District to seek an injunction now. See also Cronin v. Bd. of Educ. of East Ramapo CSD, 689 F.Supp. 197 (S.D.N.Y. 1988) ("because Congress did not intend to freeze an inappropriate placement for the review period, Courts are permitted under certain circumstances to utilize their equitable powers to modify a child's placement during the pendency of administrative and judicial appeals"); Jackson v. Franklin County School Bd., 765 F.2d 535, 538 (5th Cir. 1985) ("section 1415(e)(3) does not bar a court from exercising its traditional equity powers to modify the placement of a handicapped child during the pendency of his IEP appeal"); Doe v. Brookline School Comm., 722 F.2d 910, 917 (1st Cir. 1983) ("the power ultimately to award [appropriate equitable relief under section 1415(e)(2)] ordinarily includes t power to issue preliminary relief in the appropriate exercise of discretion") Stacey G. v. Pasadena Independent School Dist., 695 F.2d 949, 955 n.5 (5th Cir. 1983) ("the 'automatic preliminary injunction' provided by @ 1415(e)(3) does not place a statutory bar to the district court's grant of equitable relief that may result in a change of funding of the child's placement, or a modification of the placement").

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[*17]

In sum, the Court in Honig held that the stay-put provision in section 1415(e)(3) creates a presumption in favor of the child's current educational placement, "which school officials can overcome only by showing that maintaining the child in his or her current placement is substantially likely to result in injury either to himself or herself, or to others." Id. at 606 (emphasis added). There is ample evidence in the record here to demonstrate that in the regular classroom setting, at least at the present time, Rory is substantially likely to injure himself or others.

Counsel agreed at the hearing on the preliminary injunction to stipulate to those facts relating to Rory's dangerous behavior that had been alleged by individuals having personal knowledge of his behavior in affidavits submitted on the TRO application. Xenia Sterling, a special education resource room teacher for the District, stated in her affidavit that Rory has been assigned to her for resource room instruction since the beginning of the 1990 school year. Affidavit of Xenia Sterling ("Sterling Affidavit"), sworn to December 19, 1990, para. 1 5. Ms. Sterling stated that, at the beginning of the fall semester, [*18] Rory frequently engaged in disruptive, though not physically aggressive behavior. However, in late October, Rory began to exhibit physically gressive behavior. Id. at para. 9-13. On or about October 23, 1990, Rory grabbed the papers of another student without provocation, and told the student he was ready to fight him and would "get him" after school. Id. at para. 13. On that same day, Ms. Sterling observed Rory approach another student walking in the hallway and punch him without provocation. Id. On October 30, 1990, Rory stuck the eraser end of a pencil in another student's ear, and attempted to do the same to another student. He then lay on the floor, laughing and ripping up papers. He then took off one of his shoes and threw it at Ms. Sterling, but missed, and struck a student. Rory then removed his other shoe and hit another student in the head with it. Id. at para. 14. On November 5, 1990, Rory removed his shoes and threw them and hit two students. Id. at para. 15. On November 20, 1990, Rory tore up learning cards, threw chalk, ripped up other papers and threw crayons onto the floor. He then threw a chalkboard eraser at Ms. Sterling, striking her. When [*19] his regular classroom teacher arrived to remove him from the room, he threw a chalkboard eraser at her. Id. at para. 20. On November 30, 1990, Rory stated that he wanted to hit Ms. Corea, his regular classroom teacher. He also took off his shoes and threw them at another student in the hallway. Id. at para. 22.

Lura Baylor, a school teacher aide in the District, was assigned to remove Rory from his classrooms when he became disruptive, and to attempt to calm him down so he could return to the classroom. Affidavit of Lura Baylor ("Baylor Affidavit"), sworn to December 19, 1990, para. 1-6. During the first week of November 1990, Ms. Baylor saw Rory remove his shoes and throw them at School Principal Robert Darcangelo, and at her. Id. at para. 12. On November 20, 1990, . Baylor was called to remove Rory from his classroom. When they were in the llway, Rory removed his shoes and banged on a classroom door. Ms. Baylor and another teacher took Rory to a "time-out" room, where he took off his socks and threw them at his speech teacher, who had come to get him for his speech class. Rory banged on doors, yelled names at people, and took his shirt off and threw it at Ms. Baylor. [*20] Rory then attempted to take Ms. Baylor's shoes off and grabbed onto her legs. He then hit her with his fists. Id. at para. 17-18. On November 28, 1990, Ms. Baylor was summoned to remove Rory from his classroom. She took him to the time-out room, where he climbed on top of a desk and spit papers at her. He then took off his socks and threw them at her, and threw stones, paper clips and other small objects at her. Ms. Baylor took a nut and bolt from Rory's hand, and he began to strike her with his fists. Ms. Baylor called a substitute principal for assistance, and Rory was taken to the principal's office. There Rory struck Ms. Baylor again in the breast. Ms. Baylor took Rory back to the time-out room, and Rory kicked her in the knee. Id. at para. 19-22. On November 30, 1990, Ms. Baylor was called to remove Rory from his classroom. Rory attempted to strike her, and then kicked her in the hip. Id. at para. 23.

Catherine Corea was the teacher of Rory's regular third grade class during the 1990 fall semester. Affidavit of Catherine Corea ("Corea Affidavit"), sworn to December 19, 1990, para. 1-3. Ms. Corea stated that Rory was very disruptive in the classroom, and toward the [*21] end of September 1990, he became increasingly physically aggressive and verbally abusive toward her and other students. Id. at para. 6-10. Rory pushed, punched, slapped and kicked other students. Id. at 10-11. He kicked his lunch box at Ms. Corea, and threw his es, books, crayons and other items at Ms. Corea and students. Id. at 12-13. He also tipped over desks and threw chairs at Ms. Corea and other students. Id. at para. 20. n9

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n9 The District also submitted affidavits from Marena Gonz, the director of special services for the District, and Roosevelt School Principal Robert Darcangelo, in support of its application for injunctive relief. Although the affidavits included statements about Rory's aggressive behavior, they were based on reports from other persons, and not on personal, first-hand knowledge. Accordingly, they were not considered by the court on the issue of Rory's dangerousness to himself and others.

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Although the court must give great weight to the presumption in favor of Rory's current [*22] educational placement, it must balance the presumption against the interest of the District in maintaining a safe learning environment for all of its students. It is clear to the court that maintaining Rory in the regular classroom is substantially likely to result in injury to Rory, to other students, or to members of the faculty. Thus, the court may grant injunctive relief allowing the District to change Rory's placement. In considering what relief is appropriate, however, the court also allowed Rory's counsel to submit evidence on a more beneficial interim placement than the Option II program proposed by the District, in balancing the hardships to the District and to Rory.

B. Appropriate Interim Placement

The Court in Honig gave no instruction to assist district courts in determining where to place a student removed from his or her current educational placement pending administrative review. This court cautioned counsel for both parties, however, that it would not be drawn into determining the propriety of the District's proposed Option II placement for Rory at the hearing on the preliminary injunction. That is the subject of the pending administrative proceedings. The [*23] court, therefore, will not undertake the analysis prescribed by the Supreme Court in Board of Educ. of Hendrick Hudson Central School Dist. v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982), for judicial review of the state's administrative determinations on appropriate placement. n10 The proof in the instant proceeding was limited to showing whether an alternative placement to that proposed by the District would be a more beneficial or less harmful interim placement for Rory. n11 Rory's counsel argued that either the current "mainstream" educational placement, or moving Rory to the regular class at Blessed Sacrament, with tuition to be reimbursed by the District, would be more appropriate placements pending determination of his proper placement in the administrative proceedings. First, the court has already determined that, because Rory's behavior presents a substantial likelihood of injury to himself or others, he should be removed from his current placement. Second, the court is not persuaded that Blessed Sacrament is a better temporary placement.

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n10 In Rowley, the Court stated that a district court's scope of review is limited to determining whether "the State has complied with the procedures se forth in the Act" and whether the IEP "reasonably calculated to enable the c to receive educational benefits." Id. at 206-07, 102 S.Ct. at 3051. [*24] n11 The court engaged in even this limited examination of a proper temporary placement well aware of the Supreme Court's stricture in Rowley that "courts must be careful to avoid imposing their view of preferable educational methods upon the States." Id. at 207, 102 S.Ct. at 3051.

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At the hearing, Marena Gonz, the director of special services for the District, related Rory's history in the District, including his initial classification as learning disabled and the development of his IEPs. Ms. Gonz was the chairperson for the December 5, 1990, meeting at which the CSE recommended a change to the Option II placement. Ms. Gonz testified that upon review of Rory's file, which included evaluations of Rory by Drs. Ian Evans and Alan Yozawitz; medical reports; Rory's previous IEPs; and discussions with teachers and other faculty who were familiar with Rory, the CSE determined that the Option II program was the most appropriate of several alternatives considered. According to Ms. Gonz, the benefits of the Option II program over the current regular classroom placement were that Rory could be given [*25] more individualized attention to his particular speech difficulties and behavior management problems, and that he appeared to work better in smaller group settings (the size of the regular classroom was approximately 25 students; the size of the Option II class a maximum of 12 students, with a full-time special education teacher and full-time teacher aide).

Tammy Orzelek, the Option II teacher at the Horace Mann School, whose class Rory would attend, described the composition and the usual daily activities of the current Option II class. Ms. Orzelek, who has reviewed Rory's file and is familiar with his history, said that his program for Option II has been developed to suit his individual needs. Rory would work in small groups and independently, and perform work at his grade level and at higher grade levels to enhance his learning. Ms. Orzelek also testified that Rory would do "peer tutoring," in which he would learn aspects of a teaching program, and then help to teach them to another student, and "cooperative learning," in which students solve problems together. These techniques help students to develop friendships and increase confidence in their abilities, which are important [*26] to learning disabled and emotionally disturbed children, Ms. Orzelek said.

Rory's attorney, Mr. Benjamin, questioned Ms. Orzelek about whether Rory, classified as learning disabled, could learn inappropriate behaviors from students in the Option II class, who currently are all classified as emotionally disabled. Ms. Orzelek stated that it is common that emotionally disturbed students were previously classified as learning disabled, but that in her opinion, Rory would learn appropriate behaviors from her students. She testified that her students are taught to cope with their frustrations, and that overall, her students' behavior has improved since the beginning of the school year. Ms. Orzelek stated she had not taught a class with a mixture of learning disabled and emotionally disturbed students before.

Helene Stalcup is the staff development specialist for the District. Her responsibilities include working with teachers to implement teaching strategies, pair new and experienced teachers for orientation, and conduct workshops. Ms. Stalcup, who attended the December 5, 1990, meeting of the CSE, testified that the CSE's decision to recommend Rory's placement in the Option II program was [*27] based on its conclusion that his needs would be best served by that program. Ms. Stalcup also stated that she had developed a high regard for the work of Ms. Orzelek with her students, and that that opinion influenced her recommendations to the CSE.

Dr. Ian Evans, a professor of psychology at the State University of New York at Binghamton who also provides counseling services, testified on behalf of Rory. Dr. Evans has worked with Rory, and in December 1989, based on meetings with school officials and teachers, prepared a report with recommendations to help deal with Rory's behavioral problems. Plaintiff's Exh. 3. Dr. Evans also prepared a revised report in November 1990. Defendants Exh. B. Dr. Evans stated his opinion that Option II is not the proper placement for Rory, since he will not receive proper peer interaction there, and would view the Option II placement as a punishment. Dr. Evans also said that he disagreed that Rory would function better in a smaller group; that Rory's problems arise when he is confronted with certain situations that are independent of group size. The critical variable, Dr. Evans said, is understanding and sensitivity of Rory's teachers to his problems. [*28] Dr. Evans said he believes that the District has not effectively followed his set of suggestions in the December 1989 report, including allowing Rory to spend too much time in "time out" with the teacher aide. Dr. Evans said he believed Rory could participate at his grade level at Blessed Sacrament, and that he would not benefit in Option II to the same degree, though he could make progress in Option II. Dr. Evans also stated that an atmosphere of conflict that has developed between Rory's parents and the District, and a negative atmosphere surrounding Rory within the District, have become detriments to his progress.

There is no special education program at Blessed Sacrament, a private parochial school, nor a teacher aide in the classroom, Dr. Evans said. Dr. Ev agreed that Rory could not remain in a regular classroom if his behavior is as described by school officials, but that he could participate in a mainstream classroom given skilled teaching and proper attention to his individual needs.

Also testifying on Rory's behalf was Dr. Alan Yozawitz, the director of neuropsychology at Hutchings Psychiatric Center in Syracuse, New York. Dr. Yozawitz is also familiar with Rory, having [*29] performed a number of psychological assessments of him. Dr. Yozawitz said Rory's difficulties arise primarily out of a moderate expressive and receptive language disorder, and hypersensitivity to external stimuli. Rory's behavioral problems, Dr. Yozawitz said, most likely result from his frustration in his inability to understand what is being communicated to him or expected of him. Dr. Yozawitz stated that the ideal educational setting for Rory would be individualized and focused training, with a one-on-one relationship in many situations to deal with his cognitive problems, as well as mainstreaming so proper behavior can be demonstrated to him.

At the time of the hearing, Rory had been enrolled at Blessed Sacrament for only a few days, and thus his progress there could not be effectively evaluated. Although Dr. Evans expressed his approval of the Blessed Sacrament program, the record reveals little other evidence of its benefits or detriments. The court does know that there are no special education services, including speech therapy, provided by Blessed Sacrament, and no teacher aide to assist Rory, which was recommended by Dr. Evans himself in his reports. And while the court expressly [*30] refuses to pass on the appropriateness of the Option II program, the District's witnesses described various features which are designed to meet Rory's needs. Moreover, there was no evidence presented that Blessed Sacrament has been approved by the state Commissioner of Education for [illegible]cement of handicapped students, pursuant to Education Law @ 4402(2)(b)(2), which requires that contracts for services at private schools must be approved by the Commissioner for reimbursement. "[A] parent may not obtain reimbursement for a unilateral placement if that placement was in a school that was not on New York's ''approved list' of private and out-of-state schools eligible to contract for the education or handicapped students from New York.'" Tucker v. Bay Shore Union Free School Dist., 873 F.2d 563, 568 (2d Cir. 1989) (quoting Antkowiak by Antkowiak v. Ambach, 838 F.2d 635, 640 (2d Cir.), cert. denied, 488 U.S. 850, 109 S.Ct. 133 (1988)); see also Hiller v. Bd. of Educ., 687 F.Supp. 735, 741-42 (N.D.N.Y. 1988). This is because the EHA requires that "'handicapped children be educated at public expense only in those private schools that meet state educational standards.'" Tucker, [*31] 873 F.2d at 568 (quoting Antkowiak, 838 F.2d at 640, which quotes Schimmel by Schimmel v. Spillane, 819 F.2d 477, 484 (4th Cir. 1987)); see 20 U.S.C. @ 1401 (18)(B).

Conclusion

The District's motion for an injunction allowing it to place Rory in its Option II program pending the outcome of the administrative proceedings under the New York Education Law is granted.

IT IS SO ORDERED.

5TH CASE of Level 2 printed in FULL format.

STANLEY E. ASH, BARBARA ASH and CHRISTOPHER ASH, a minor by and through his natural parents, Stanley E. Ash and Barbara Ash, Plaintiffs, v. LAKE OSWEGO SCHOOL DISTRICT NO. 7J, Defendant

Civil No. 90-746-FR

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

766 F. Supp. 852; 1991 U.S. Dist. LEXIS 7564

May 31, 1991, Decided
May 31, 1991, Filed

COUNSEL: [**1]

Robert F. Blackmore, Dunn, Carney, Allen, Higgins & Tongue, Portland, Oregon, Attorneys for Plaintiffs.

Thomas S. Moore, Portland, Oregon, Attorney for Defendant.

JUDGES: Helen J. Frye, United States District Judge.

OPINIONBY: FRYE

OPINION: [*853] FINDINGS OF FACT AND CONCLUSIONS OF LAW

HELEN J. FRYE, UNITED STATES DISTRICT JUDGE

Plaintiffs, Stanley E. Ash, Barbara Ash and Christopher Ash, bring this action under the Individuals with Disabilities Education Act (the Act), n1 as amended, 20 U.S.C. @@ 1401 et seq., alleging that the defendant, Lake Oswego School District No. 7J, has failed to provide a free, appropriate public education to Christopher Ash as required by federal law.

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n1 This Act was amended effective October 30, 1990 by section 901(a)(3) of Pub. L. 101-476 and was formerly known as the Education for All Handicapped Children Act.

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FACTS

Christopher Ash, the son of Stanley and Barbara Ash, was born on August 23, 1978. The Ashes reside in the Lake Oswego School District (LOSD) in Clackamas County, Oregon.

In August, 1981, Christopher was evaluated by the Clackamas County Educational [**2] Service District (ESD) and referred to the mentally retarded, developmentally delayed (MR/DD) playschool program conducted by the ESD. On September 8, 1981, Stanley Ash signed a release to permit Christopher to participate in the MR/DD playschool program through the ESD. On the front of release was the statement: "See the back of this page for a copy of your legal rights." On the back of the release was a list of the procedural safeguards for parents, including their right to initiate an impartial due process hearing related to any aspect of the individualized educational program (IEP) prepared for their child.

An IEP was prepared for Christopher by a child study team on November 9, 1981. Thereafter, Christopher was placed in the MR/DD playschool program for children administered by the ESD.

In June, 1982, Christopher was evaluated by Dr. Thomas Nakata, a psychiatrist, who diagnosed his condition as infantile autism. Autism is a chronic disorder which manifests during early childhood and which severely affects the communication abilities and the behavior of a child. Autism includes disturbances of 1) the developmental rates and/or sequences of a child; 2) the ability of a child [**3] to respond to sensory stimuli; 3) the speech and language and ability to communicate of a child; and 4) the capacity of a child to relate to people, objects and events.

On August 3, 1982, Dr. Nakata and another doctor referred Christopher to the District and Regional Assessment Center (DRAC) of the Portland Public Schools for evaluation. On September 1, 1982, personnel from the DRAC notified Patrick Highhouse, Director of Special Services for the LOSD, of the referral. On October 11, 1982, Stanley Ash signed a "Prior Notice and Parent Consent for Evaluation" from the Special Education Program of the Portland [*854] ublic Schools, which listed the legal rights of parents on the back including right of parents to request an impartial due process hearing. On October 12, 1982, the evaluation team from the DRAC concluded that Christopher was eligible for special education services under the category of autistic.

On November 15, 1982, the Director of Special Education for the ESD completed a form indicating that Christopher's parents wanted to have him evaluated at DRAC for placement in the autistic preschool classroom in Portland, Oregon, and the form stated that the parents would withdraw [**4] him from the MR/DD playschool program effective September, 1982.

On November 17, 1982, Highhouse met with Stanley and Barbara Ash. Highhouse explained that students with autism generally receive services through the regional program at the Kelly Center. The Ashes were interested in learning about the regional program at the Kelly Center, but were also considering placing Christopher in a regular playschool with a full-time tutor.

At about the same time, Christopher began treatment with Dr. Douglas Golden who offered specialized play therapy. Dr. Golden also worked with the Ashes in dealing with Christopher and the problems his condition and his needs were causing in the family. Dr. Golden worked with Christopher regularly until May, 1983 and thereafter occasionally until July, 1985.

The Ashes decided to enroll Christopher in a Montessori School. They hired a tutor, who was a special education specialist, to accompany Christopher and to assist him in school.

On August 23, 1983, Christopher became five years old, and therefore eligible for public education under Pub. L. 94-142. Christopher was attending the Montessori School at that time, and his parents did not enroll him in a public

[**5] school in the LOSD in 1983. The LOSD made no effort to locate him in 1983.

In the spring of 1984, an administrator from the Montessori School told Stanley Ash that Christopher was "getting kind of big" in comparison with the other students and that his behavior could sometimes be very disturbing in the classroom setting. She recommended that Stanley Ash talk to Highhouse. Stanley Ash made a brief, unscheduled visit to Highhouse to ask whether Christopher could attend a public school with his tutor. Highhouse said it would be inappropriate to bring a private instructor into a public school. Stanley Ash felt that "that was the end of the line." Transcript of Hearing, Vol. 2, p. 502. The Ashes did not contact Highhouse again about Christopher's education until January, 1989.

Christopher remained at the Montessori School with a tutor until the summer of 1985. By that time, Christopher's behavior at home had become a serious problem. He was having severe tantrums almost every day and had put his hand through a window. Barbara Ash told Dr. Golden that she thought she would have a nervous breakdown if Christopher remained at home. Dr. Golden agreed with the Ashes that residential treatment [**6] was necessary because of Christopher's behavior and its effects on the family.

In September, 1985, the Ashes placed Christopher in the Tokyo Higashi School, a residential school for autistic children. In 1987, the founder of the Tokyo Higashi School opened the Boston Higashi School in Boston, Massachusetts. Christopher was transferred to the Boston Higashi School from the Tokyo Higash[illegible] School. Christopher continues to reside in the Boston Higashi School.

The Boston Higashi School offers a program called Daily Life Therapy. Daily Life Therapy emphasizes the building of physical strength and the development of those skills necessary for daily living. Children are taught in groups, but they receive intensive individual attention.

In September, 1987, Christopher's brother began to receive special education services from the LOSD. In connection with the services provided to Chrisopher's brother, the Ashes received written notice of their legal right to obtain special education [*855] services for Christopher in the LOSD three or four times in 1987 and in 1988.

In January, 1989, Stanley Ash learned from other parents that the local school district of an autistic child would pay part of the expenses [**7] for a child residing at the Boston Higashi School. Stanley Ash met with Highhouse on January 18, 1989 to discuss the possibility of being reimbursed for the expenses of educating Christopher at the Higashi Schools and to learn what the LOSD was doing to educate autistic children. Highhouse suggested that Christopher be evalu ed. He gave Stanley Ash literature, including copies of the policies and regulations applicable to the LOSD. Highhouse agreed to inquire about reimbursement for the Ashes, and Stanley Ash agreed to provide Highhouse with information from the Boston Higashi School. On March 9, 1989, Stanley Ash sent Highhouse the IEP prepared for Christopher by the Boston Higashi School.

On March 17, 1989, Highhouse advised the Ashes that tuition reimbursement equal to the costs that would be incurred by the LOSD to educate Christopher in the LOSD was not an option at that time given that the LOSD had not participated in any of the procedural safeguards available to Christopher. Highhouse ained that the LOSD needed to evaluate Christopher and prepare an updated IEP in order to determine Christopher's eligibility for services.

On May 3, 1989, Robert Blackmore, an attorney for [**8] the Ashes, contacts the Superintendent of the LOSD, William Korach, to formally request an evaluation of Christopher and the development of an IEP for him. Christopher returned home from the Boston Higashi School in July, 1989, and an evaluation of Christopher was completed on August 22, 1989.

The evaluation of Christopher included an interview with the Ashes, a cognitive evaluation of Christopher, behavioral observations of Christopher at his home, a home visit, a speech and language evaluation, audiological screening, and an academic evaluation. The evaluators concluded that 1) Christopher had virtually no language form with which to communicate since he had a vocabulary of only five words; 2) Christopher's adaptive behavior was at the level of a child two years and three months old; 3) Christopher's motor skills were significantly below expectation; and 4) Christopher's visual attention span was extremely short. The evaluators did not find significant self-destructive behavioral problems.

On September 6, 1989, Highhouse and the evaluation staff discussed these results with Stanley Ash and advised him that Christopher was autistic and eligible for the special education services [**9] provided for autistic children by the LOSD. It was not determined at this meeting whether Christopher was eligible for the services that the ESD provides for retarded, autistic ldren in self-contained classrooms in the public schools. Prior to this cussion, Christopher had returned to the Boston Higashi School.

There are no placement options available in the ESD for children who require residential placement in order to be provided an appropriate education. Residential placement options within the State of Oregon include one group home, possible foster care, and short-term placement in state facilities.

On September 13, 1989, Stanley and Barbara Ash attended a conference regarding Christopher's IEP with Highhouse; Devon Welch-Homes, a consulting teacher; Julie Dunn, a speech pathologist; and Colleen Nyberg, a consultant on autism. Individual goals and objectives for Christopher were developed. The Ashes approved these goals and objectives. They asked that the IEP be typed and sent to their home. The Ashes told Highhouse to put the recommendation for the placement of Christopher, which had not been discussed yet, in writing and send it to them. The IEP was thereafter sent to the [**10] Ashes on September 15, 1989, along with a notice of their legal rights and a form for providing parental consent to placement. The form for providing parental consent to placement was not returned to the ESD by the Ashes.

The educational goals of the IEP prepared for Christopher in 1989 were designed, [*856] in general, to improve his communication skills; to teach him to follow directions, to recognize his name, to count to ten, to maintain a low level of self-stimulating behavior such as screaming; to get him to interact with his peers; to get him to maintain the visual attention span necessary to plete tasks; and to increase his physical fitness and ability to play.

These educational goals were to be met by placing Christopher in a self-contained classroom in a public school administered by the ESD. In a self-contained classroom in a public school, the students receive instruction in small groups or individually from the teacher and the aides who provide related services. There are approximately eight to twelve students with one teacher and two aides. Under the IEP, Christopher was to join regular students at lunches, recesses, assemblies, and other special school activities.

On October [**11] 10, 1989, Highhouse advised the Ashes that the LOSD was prepared to implement the IEP. The Ashes declined to place Christopher in a public school in the LOSD. However, they asked for a due process hearing seeking reimbursement from the LOSD for the tuition and room and board that they had paid on behalf of Christopher from September, 1985 until January, 1990, as well as other expenses related to his education.

A due process hearing was held from January 30, 1990 until February 2, 1990. Thirteen witnesses testified, and numerous exhibits were received. The record of that hearing is before this court. The witnesses included fact and expert witnesses on behalf of the Ashes and on behalf of the LOSD. Both sides were represented by counsel.

At the due process hearing, the LOSD presented witnesses who had evaluated Christopher and who had developed an IEP for him in 1989. These witnesses described the curriculum that would be offered to Christopher through the LOSD. They testified that the curriculum includes the teaching of skills compatible with the skills that children of Christopher's age have. These witnesses testified as to their evaluation of Christopher and the services that could [**12] be provided to him in the self-contained classroom environment in the LOSD.

Devon Welch-Holmes, an instructional consultant with the ESD, and Julie Dunn, a speech and language therapist for the ESD, testified that residential placement is acceptable for an autistic child under very limited circumstances -- and then only if the child is a danger to himself.

At the due process hearing, the LOSD presented the testimony of Gary Mesibov, a nationally recognized expert on the education of autistic children and a professor of psychology at the University of North Carolina, who is the co-director of a program called TEAACH which was established in 1972 to provide services to autistic children and their families. In the opinion of Mesibov, the curriculum for the Clackamas County MR/DD program is a strong curriculum which is consistent with current educational practices. Mesibov has observed two of the classrooms operated by the ESD in the LOSD for a wide range of handicapped children, and he found the curricula in each to be impressive. Mesibov was asked whether these classes were appropriate for teaching autistic children, and he responded:

> Well, I think there's a lot of controversy as to [**13] whether that's appropriate or not in the field. I don't think there's general agreement. In terms of my personal opinion, I think the curriculum that's offered and the degree of individualization and the presence of mainstreaming and things like that are more important ingredients than who are the other children in the class, particularly if we can balance that with having non-handicapped children come in. So, as I say, it's hard to identify for me what the prevailing professional practice would be because people do differ in their opinion abo[illegible] that.

Transcript of Hearing, Vol. 1, pp. 221-22.

Mesibov testified that the IEP developed for Christopher in 1989 was appropriate and adequate to meet Christopher's needs; that Christopher can benefit from the education proposed by the LOSD; and that a [*857] residential placement is not necessary for Christopher. When asked under what circumstances, if any, he would recommend a residential placement for an autistic child, Mesibov testified:

> There are some I would. I think there are certain -- I think the classroom program the school system offered -- if the classroom lacked structure, lacked opportunity, lacked expertise, lacked backup support [**14] -- I think one important aspect of that decision from my perspective would be what's the alternative. And then I think another thing is the child himself. I think that from the record and what I've seen, Christopher seems to be a child with autism which means he's a very challenging child and a very difficult child but he's not a child who's totally out of control in most situations. And I think what you try to balance is, you know, the family is a wonderful resource and the question is if he can be managed within the family and educated within the school system, then he also has the opportunity of growing up in a family just like other children do, and that's, I think, an important opportunity. He also has an opportunity to grow up in the community where supposedly he will be living as an adult, which means the community is going to learn more about him, he's going to learn about the community, and that's going to increase his advantages. So, I think, you always have to weigh, in my mind, you know, the things that he would have to give up to go away versus the things that he gets from going away and then how difficult he is, and then what the school system has to offer so, you know, [**15] it seems like his family has a lot to offer him, that the school program has a lot to offer him, and although he's difficult -- you know, there's no such thing as an autistic child who's not difficult -- he's not totally unmanageable. I mean, he doesn't walk into a room and destroy everything in it as some autistic people do. You know, he's not the kind of physical danger to his family or other people that other people are, at least from my observation of the record and how he performed in the evaluation. Those are the considerations that I would take into account. I guess I should also say, you know, since I think the advantages of being with a family are so great and being in the community that he's going to live in as an adult, [residential placement is] a recommendation I make only rarely.

Id. at 270-72.

Stanley and Barbara Ash described Christopher's disability; the effects it has had on them and their family; and their decision in 1985 to place Christopher in a residential program. In addition to their own testimony, the Ashes presented the testimony of two administrators at the Boston Higashi School, Dr. Paul Hardy and Robert Fantasia.

Hardy is an expert in neurology, [**16] psychiatry and behavioral neurology and is the President of the Board of Directors and the Executive Director of the Boston Higashi School. Hardy testified that several factors are important in determining whether residential placement is necessary for the education of autistic children; that in addition to controlling the behavioral problems that interfere with the ability of autistic children to learn, it is necessary for an autistic child to have consistency, twenty-four hours a day, seven days a week, in order for skills to be developed and then reinforced; and that Christopher suffers from an anxiety or panic disorder which also necessitates his being placed in a residential setting. Hardy stated that the most important factor in determining whether a residential placement, rather than a day-time educational placement, is necessary for an autistic child is whether the proffered day-time program can satisfactorily address the needs of the child for absolute consistency. In Hardy's opinion, Christopher cannot benefit from home placement with day-time schooling at this time:

> Residential placement is always a complex issue and question. And it needs to be considered in a total evaluation [**17] of the child and the family. . . . It is now clear that there are issues of anxiety disorder in Chris which require that he [*858] have an extremely consistent programming between his day program and his residential program.

Transcript of Hearing, Vol. 2, pp. 368-69.

> I think based on the family history . . . that Chris very likely has panic disorder and the present IEP [LOSD 1989] does not adequately address that, whereas the Higashi IEP systematically deals with anxiety and helps to reduce that [anxiety] through its consistency, its physical education -- those being the most important aspects.

Id. at 371.

Robert Fantasia is the Administrator of Special Education at the Boston Higashi School and an expert in the education of autistic and handicapped children. Fantasia testified that Christopher should remain in a residential setting at this time. When asked to review the factors that were important to his determination that Christopher needed to be educated in a residential setting, Fantasia testified:

> I think the first one with Chris were behavioral issues and not simply whether the Ashes could manage Christopher at home but whether outside of the day residential part, whether [**18] anyone could manage the behaviors and whether, without the continuity and consistency between the day and residential aspect, whether the gains that he had made, would those be maintained, and our feeling was that they would not, they would not be maintained, if he did not have not just 24-hour intervention but seven day a week intervention.
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> . . . .
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> I think the intensity of Chris's behaviors, the kinds of behaviors that he was involved in, that they could be both self-injurious and also that they could have the potential to be hurtful such as his biting, hitting [inaudible]. And in addition to that, you know, when I talked about the three aspects, the living skills that he had gained we felt that there was still a potential for him to lose those, not just regression but to lose those, if he were not over a prolonged period of time in an intense program.

Id. at 428-29.

On March 30, 1990, the administrative hearing officer entered a final order allowing the LOSD to implement the IEP it prepared for Christopher in 1989 if Christopher's parents enrolled him in the LOSD, and denying the claim of Sta and Barbara Ash for reimbursement of expenses relating to their residential educational [**19] plan for Christopher.

In her final order, the administrative hearing officer made extensive factual findings and discussed the applicable law. The hearing officer concluded: 1) that the LOSD has the burden of proving that the IEP prepared for Christopher in 1989 is appropriate; 2) that the obligation of the LOSD to serve the educational needs of Christopher first arose in early 1984 when Stanley Ash made a visit to Highhouse to inquire as to whether Christopher could attend public school with his tutor; 3) that the IEP prepared for Christopher in 1989 is appropriate and that it need not have prescribed residential placement; and 4) that Stanley and Barbara Ash are not entitled to reimbursement for the years Christopher has spent at the Tokyo and the Boston Higashi Schools.

The administrative hearing officer adopted the opinions of Gary Mesibov that "the classroom teaching methods in the ESD autistic program reflect current best education practices; and that the LOSD IEP for [Christopher] was appropriate." Final Order, p. 24. Based on the opinion of Gary Mesibov, the administrative hearing officer concluded that the LOSD had presented a prima facie showing that the IEP prepared for [**20] Christopher by the LOSD was appropriate, and that Stanley and Barbara Ash had failed to refute that showing and had failed to support their contention that Christopher required residential placement. The hearing officer stated:

> In most cases residential placement is not required for an autistic child unless the child is a danger to himself or others - not as a result of cognitive immaturity (e.g. failing to recognize danger and [*859] stepping off the curb on a busy street), but as a result of violent, self-destructive or assaultive behavior (e.g. gouging at his or her own eyes). [Christopher] was not a danger to himself or others in this sense.
>
> The evidence shows that residential placement for [Christopher] may well be necessary to maintain harmony in his family. But [Christopher] does not require residential placement in order to gain meaningful benefit from his education. By sending [Christopher] out of his community to a residential school LOSD would violate the federal mandate to educate him in the least restrictive environment where he can receive a [free appropriate public education]. LOSD's proposal to educate [Christopher] in a self-contained classroom in a public school [**21] near his home, where he will have daily contact with non-handicapped students, is consistent with that mandate.

Final Order, p. 25 (emphasis in original).

The hearing officer also concluded that the IEP prepared for Christopher by the LOSD in 1989 would be better if it included transitional plans and services for Christopher and his parents; counseling and training for his parents; respite services for his parents; and possibly extended day, week and school year services; but that even without these additions, the IEP meets the requirements of the law.

The Ashes thereafter filed this action seeking 1) reimbursement of the educational expenses they have incurred because of the failure or refusal of the LOSD to initiate an evaluation and to prepare an appropriate IEP for Christopher; 2) a declaration approving residential placement for Christopher at the Boston Higashi School and directing the LOSD to reimburse Stanley and Barbara Ash for the costs of the residential placement, along with the incidental fees they have incurred; and 3) an award of the attorney fees, costs, and disbursements incurred in this action.

On April 16, 1991, the court held a hearing at which time supplemental [**22] testimony was presented by both parties.

At the hearing, the Ashes offered the expert testimony of Dr. Mary Cerreto, the Director of Psychology at the Franciscan Children's Hospital and Rehabilitation Center in Boston, Massachusetts. Dr. Cerreto is familiar with the Boston Higashi School. She has evaluated Christopher and has reviewed the records and files relevant to this case. Dr. Cerreto is imminently qualified to offer an expert opinion on the issues in this case.

Dr. Cerreto testified that in her opinion Christopher needs a twenty-four-hour-a-day, seven-day-a-week educational program:

Chris's greatest educational need right now is for an environment that will do . . . two things: one, concentrate on the process of Chris's learning; and second, concentrate on the content of Chris's learning. What do I mean by that. He needs 24 hours [a day] because he needs a consistent environment. Chris is not going to be the type of child that's going to learn how to brush his teeth in a classroom. He is not going to learn how to buy things in a classroom store. He's not going to learn how to know what a post office is by reading about it in a story. He's not going to know how to go to bed [**23] and adjust to the social things you have to do before bed, the self-help things you have to do before going to bed. Chris needs to be taught in a natural environment because his cognitive abilities are so low he can't generalize from one environment to the next.

Secondly, he needs a consistent approach across all of those environments. needs an approach where the person who teaches him how -- self-help skills before bed [--] uses exactly the same approach, rewards, teaching methods, observation methods, evaluation methods that the person who does self-help skills when he wakes up in the morning. So two prime reasons [are] that this young man can't generalize from one situation to another. And at this stage he needs to be taught in each of those, the natural environment. The consistency is a second major reason for his evaluation.

[*860] Third is that the things he needs to learn range the entire 24-hour day. He has for example in the past learned to become toilet trained. That was part of a school curriculum. Education for Chris is the ability to be successful outside certainly the classroom and that has incorporated a lot more things than just traditional academics. And so these are [**24] the things that a 24-hour a day setup in education can provide him.

Transcript of Testimony of Mary Cerreto and Gary Mesibov, pp. 23-24 (emphasis added).

Dr. Cerreto testified that Higashi is an "appropriate placement for Christopher:"

It provides a 24-hour-a-day seven-day-a-week around the clock, one. Two, it provides education five-and-a-half days a week, and we know with children with autism that the amount of . . . instructional time is highly correlated with they do so they provide a lot of education. They have a very good understandi of where Chris is. They understand how he -- if he is operating understanding his world at four years [--] how they should teach him communication, how they should teach him self-help skills, how they should teach him exercise and at lowing directions, how to base an educational program. They're highly, highly adapted at developmental knowledge. Teachers have a great deal of skill and development as well as education.

Id. at 25-26.

Dr. Cerreto agreed that a residential care program is not necessary for all autistic children:

Children with autism, like children without autism, vary a great deal. They vary depending on their level of [**25] cognitive ability of understanding of the world, language abilities, communication abilities and behavior. And I think one of the greatest things that has happened to us during the last decades is that we now have successful autism. We have persons who are autistic who are in integrated classrooms, who are in competitive work sites, who are certainly living in the community, and we never had successful autism before.

Id. at 35.

However, in Dr. Cerreto's opinion, based upon her evaluation and diagnosis of Christopher, residential placement is necessary in order for Christopher to receive the basic floor of a free and appropriate education:

For this period of time and next year, two years perhaps, he needs to be taught in natural environments. He cannot generalize from one environment to another. needs multiple teaching[;] he needs communication and language taught. In the rning when he gets up he needs it[;] when he gets off the bus[;] he needs a communication focus when he's in art class. He needs a communication focus when he's in gym class. He needs communication focus when he's playing at home. He needs self-help skills taught in all those settings. He needs eating [**26] skills taught at breakfast, lunch and dinner.

The major argument that I make when I'm looking at residential placement is how the child needs to be taught in order to generalize the situation or in order to be successful in enough situations so you can begin removing those and he knows he has a consistent way of eating. He eats that way no matter where he is. So my no. 1 is that Chris can't learn in different situations with different cues.

Two, its the consistency of the approach. Specific to Higashi we have the same teachers who are working with him from 9 o'clock in the morning till 4 o'clock in the afternoon when he's in school, also teaching him the skill behaviors in the natural environment. Coats and where to put things and games and how to interact with peers and how to go to the store, those kind of things. Those are two of the major things that -- reasons why I look at a residential placement.

Id. at 36-37.

At the hearing, Mesibov testified that he had visited the Boston Higashi hool and had evaluated Christopher at the school, [*861] and that this it reinforced his conclusion that the IEP prepared for Christopher by the OSD is a reasonable one. Mesibov explained why he [**27] believed that Christopher would receive an appropriate education in the LOSD:

I think one of the -- one of the questions we all agree on and everybody who been here agrees on is that there's a very small percentage of children who need residential care. I think what we don't always agree on is how do we identify those children and how do we know who they are.

In my particular case, as I say, when you have a child with autism they need two things and they're somewhat incompatible. They need a tremendous amount of consistency and . . . the flexibility to live in our society which is changing every minute. So, as I say, in some levels those two things are incompatible.

And what we try to do in different ways, may be emphasizing the consistency when they're younger and the transition and the changes as they enter school, is we try to integrate both into an educational program. Well, there are certain children in my opinion who need so much consistency that they cannot function. You know, we use the term, not a very professional term, but "out of control". They're out of control if the least thing in their environment changes and isn't there.

And very often [this] is manifest through [**28] aggressive behaviors and disruptive behaviors and behaviors that are dangerous to themselves and others. Sometimes there are other manifestations. But basically if there's the least little change in their environment then they -- it's not only that they're upset and disruptive which all autistic children are [--] they just literally can't function.

So when I look for this one percent or one-half percent who have to have a residential program, that's what I'm looking for. And it was not my opinion t Christopher fell in that one percent, which is not to say that he doesn't need consistency . . . which is not to say that he doesn't have the problems of a person with autism, but that basically at this point I think, and this is what I had thought from the records of my evaluation, was able to corroborate it, that he can handle the kinds of inconsistencies that come from not being in a 24-hour-a-day program.

Id. at 80-81.

STANDARD OF REVIEW

20 U.S.C. @ 1415(e)(2) provides that "in any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance [**29] of the evidence, shall grant such relief as the court determines is appropriate."

Review by the court has been described as "something short of a trial de novo," being on the record with the opportunity for the parties to supplement the record. Town of Burlington v. Department of Educ., 736 F.2d 773, 790 (1st Cir. 1984, quoting Colin K. By John K. v. Schmidt, 715 F.2d 1, 5 (1st Cir. 1983), aff'd on other grounds, 471 U.S. 359, 85 L. Ed. 2d 385, 105 S. Ct. 1996 (1985). While some addition to the administrative record is allowed, this does not change the character of the hearing from one of review of the record to trial de novo. Id. at 791. In reviewing the case, the trial court must give specific consideration to the findings of the hearing officer. Id.

APPLICABLE LAW

In order to qualify for federal assistance under the Individuals with Disabilities Education Act, a state must demonstrate that it "has in effect a policy that assures all children with disabilities the right to a free appropriate public education." 20 U.S.C. @ 1412(1) (Supp. 1991). The free appropriate public education must be tailored to meet the needs of the individual child by [**30] means of an IEP. 20 U.S.C. @ 1401(a)(18).

In Board of Educ. v. Rowley, 458 U.S. 176, 200, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982), the Court addressed the issue of [*862] what is meant by the Act's requirement of a "free appropriate public education." The Court concluded:

> Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. It would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education. . . . We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.
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> . . . .
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> When the language of the Act and its legislative history are considered together, the requirements imposed by Congress become tolerably clear. Insofar as a State is required to provide a handicapped child with a "free appropriate public education," we hold that it satisfies this [**31] requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.

Id. at 200-03.

In addition to providing personalized instruction for a handicapped child, a state must comply with the Act's requirement that this personalized instruction be provided in the least restrictive environment. In order to do so, a state must adopt:

> procedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. @ 1412(5)(B) (Supp. 1991).

Handicapped students are normally enrolled in regular public schools, with the public schools providing the necessary services and making the necessary modifications to their environments and [**32] programs in order to ensure the continued enrollment of handicapped students and to ensure educational benefits for them. If, however, a local public school district cannot educate a handicapped child in regular or special classes, the Act authorizes placement in a residential program. 20 U.S.C. @ 1413(a)(4)(B). Regulations promulgated under the Act provide: "If placement in a public or private residential progr is necessary to provide special education and related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child." 34 C.F.R. @ 300.302 (1986).

Courts have concluded that residential placement is necessary to provide a severely autistic child with an appropriate education. See, e.g., Stacey G. v. Pasadena Indep. School Dist., 695 F.2d 949 (5th Cir. 1983); Drew P. v. Clarke County School Dist., 676 F. Supp. 1559 (M.D. Ga. 1987). The focus in determining whether residential placement is necessary must be on whether the placement is required for educational purposes apart from the medical, social or emotional problems that are segregable from the learning [**33] process. Kruelle v. New Castle County School Dist., 642 F.2d 687, 693 (3d Cir. 1981); Vander Malle v. Ambach, 667 F. Supp. 1015 (S.D.N.Y. 1987).

ANALYSIS

In Board of Educ. v. Rowley, 458 U.S. 176, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982), the Court held:

[A] court's inquiry in suits brought under @ 1415 (e)(2) is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably [*863] calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

458 U.S. at 206-07.

As the court recognized in Rowley, the determination of when a handicapped child is receiving those educational benefits required by the Act can be a difficult problem. Rowley, 458 U.S. at 201-02. In every case, the decision is factual and dependent upon the unique problems of the handicapped child.

The issue for this court to decide is whether the Ashes have shown by a preponderance of the evidence that the failure [**34] of the IEP prepared by the LOSD to provide Christopher with residential placement denies Christopher sufficient access to a free, appropriate public education through which Christopher can derive some educational benefit.

This court finds the opinion of Dr. Mary Cerreto that Christopher cannot generalize from one learning environment to another -- that is, Christopher cannot learn something at school and then take that learning home or into the community -- to be compelling. Dr. Cerreto's conclusion is consistent with all of the evidence in the record as to Christopher's severe disability. Christopher has a severe anxiety or panic disorder which cannot be addressed effectively in a classroom setting. In order for Christopher to benefit from a learning environment, the environment in which learning takes place must be a twenty-four-hour-a-day, seven-day-a-week, completely consistent environment.

An appropriate education for Christopher is an education which will make possible for him to be successful outside of a classroom setting. The evidenc in this case shows that an appropriate education for Christopher is one that only a twenty-four-hour-a-day, seven-day-a-week educational [**35] ironment can provide. While residential placement for a handicapped child is only appropriate in very limited circumstances, Christopher's medical, social and emotional problems are so severe that they are not segregable from his learning process, and therefore residential placement is required for educational purposes. Daily living skills, such as toileting and eating and dressing, can only be taught to him and reinforced for him in the consistency of a residential setting.

Dr. Cerreto's opinion is bolstered by the evidence in the record that the placement of Christopher in the Higashi School is an appropriate placement for him. His severe behavioral problems have improved, and he has received significant educational benefits from that placement.

The hearing officer was without the opinion of Dr. Cerreto and reasonably concluded that the testimony of the Higashi staff was not adequate to outweigh the expert opinion submitted by the LOSD that its IEP was adequate for Christopher. This court has had the benefit of weighing the independent expert testimony presented by both parties and finds that the LOSD has not demonstrated that its IEP would provide the type and amount of consistency [**36] necessary in order for Christopher to obtain some educational benefit from its implementation. After a review of the record and the evidence presented to this court, the court is convinced that, at this point in time, Christopher must receive educational services in a residential setting if he is to obtain an appropriate education under the Act.

Having concluded that the Ashes have carried their burden to prove by a eponderance of the evidence that, contrary to the proposed IEP prepared by the LOSD in 1989, Christopher was in need of residential placement, this court must determine the relief that is appropriate. 20 U.S.C. @ 1415(e)(2).

The Supreme Court has held that the Act authorizes a court to reimburse parties for special education if the court ultimately determines that such placement, rather than the proposed IEP, is proper under the Act. School Comm. of Burlington v. Department of Educ., 471 U.S. 359, 367-69 [*864] , 85 L. Ed. 2d 385, 105 S. Ct. 1996 (1985). Since this court has concluded that it was appropriate to place Christopher in a residential facility contrary to the IEP prepared by the LOSD in 1989, the court has the authority to order reimbursement to his parents who have incurred the [**37] costs.

This court agrees with the reasoning of the court in Wexler v. Westfield Bd. of Educ., 784 F.2d 176, 184 (3d Cir.), cert. denied, 479 U.S. 825, 93 L. Ed. 2d 49, 107 S. Ct. 99 (1986):

> The EAHCA provides a comprehensive scheme for furnishing a free appropriate public education to handicapped children, and commits to medical and educational professionals employed by the state the responsibility for setting forth an individualized program for each child. In addition, the EAHCA sets forth procedures whereby parents may monitor the state and local determinations and protest them if they think the determinations are erroneous. Indeed, the EAHCA allows parents who disagree with their child's placement to place the child se-where and receive reimbursement in the event that the proposed placement inappropriate. See Burlington School Committee v. Dept. of Education, [471] U.S. [359], 471 U.S. 359, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985). However, that right to reimbursement exists only when the proposed placement was indeed inappropriate as measured by the standards set forth by the EAHCA and

accompanying state and federal regulations.

In this case, the Ashes [**38] did not make meaningful contact with the LOSD to seek services for which Christopher was eligible until January 18, 1989. Prior to January 18, 1989, the Ashes made a unilateral decision to enroll Christopher in the private school of their choice, located out of the country initially and subsequently out of state, before the school district had the opportunity to assess Christopher's educational needs and make a placement recommendation. There was no disagreement between the LOSD and the Ashes prior to the decision of the Ashes in 1985 to place Christopher in the Tokyo Higashi School. A disagreement is an essential element in the right to reimbursement under the Act. See also Hunter v. Seattle School Dist. No. 1, 46 Wash. App. 523, 731 P.2d 19 (1987).

This court has not ignored the fact that in April, 1984, Stanley Ash contacted Highhouse to inquire about sending Christopher to a school in the LOSD with a tutor. However, this brief contact with the LOSD does not change the nature of the decision of the Ashes in September, 1985 to send Christopher to the Tokyo Higashi School from a unilateral decision by them to a decision necessitated by a disagreement with the LOSD. Nor [**39] does this court find that the LOSD failed to comply with the procedures set forth in the Act in a material manner that affects the outcome in this case.

In January, 1989, the Ashes contacted the LOSD, and the process of evaluating Christopher began. The process of evaluating Christopher was not completed until September, 1989 because Christopher was in school in Boston. After the IEP prepared by the LOSD was completed in September, 1989, the Ashes chose to send Christopher back to the Boston Higashi School and to pursue their disagreement with the LOSD over Christopher's need for residential care through the courts. This was the point in time when the Ashes' right to reimbursement arose for the expenses that they incurred in providing the residential care necessary for Christopher to receive an appropriate education. At this point in time, the LOSD had been asked to provide services to Christopher and had been given a reasonable opportunity to complete the process of evaluating Christopher and making a placement recommendation.

CONCLUSION

The court finds that the Ashes have carried their burden of proving by a preponderance of the evidence that contrary to the IEP prepared by the [**40] LOSD in 1989, Christopher was in need of residential placement. The court finds that the Ashes' right to reimbursement for the costs incurred by them in providing Christopher [*865] with a residential placement arose in September, 1989 when the school district had been asked to provide educational services to Christopher and had been given a reasonable opportunity to complete the process of evaluating Christopher and making a placement recommendation for him.

The court finds that the decision of the Ashes to place Christopher in the Boston Higashi School in September, 1989 was proper under the Act. Given the unwillingness of the LOSD to provide a residential placement for Christopher at the time the IEP was completed in 1989, the court finds that the Ashes should receive reimbursement for the costs incurred in providing schooling for Christopher in the residential setting of the Boston Higashi School after September, 1989. The parties must submit supplemental memoranda addressing the [illegible]ue of the specific amount of reimbursement appropriate unless they can reach [illegible] agreement on the amount of reimbursement.

The court understands the burden that this decision places upon the LOSD and emphasizes, [**41] as the court emphasized in the Drew case, "that this decision is limited to the unique situation involving a severely autistic child suffering from severe mental retardation." 676 F. Supp. at 1570. It is not the role of this court to rewrite the IEP for Christopher. The parties must attempt to reach a mutually acceptable arrangement that will provide a residential placement for Christopher at a reasonable cost to the LOSD.

The foregoing opinion constitutes findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

DATED this 31 day of May, 1991.

SETTLEMENT AGREEMENTS IN CIVIL RIGHTS LAWSUITS: SOME CONSIDERATIONS

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Keystone, Colorado
February 6-7, 1992

The Civil Rights Act of 1991 places a strong emphasis on alternative dispute resolution (ADR) and spells out the available options:

> "Sec. 118. Alternative Means of Dispute Resolution.
>
> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including:
>
> 1. settlement negotiations,
> 2. conciliation,
> 3. facilitation,
> 4. mediation,
> 5. fact finding,
> 6. mini-trials, and
> 7. arbitration,
>
> is encouraged to resolve disputes arising under the acts or provisions of federal law amended by this Title. (Numbers added.)

When does encouragement become a requirement? There appears to be no serious question that early review of alternative dispute resolution methods in civil rights cases is essentially mandated.

I. Attorney's Obligation to Discuss Settlement With Client

Some states are seriously considering amending the provisions of Canons 6 and 7 of the Code of Professional Responsibility to require lawyers to advise their clients of alternative forms of dispute resolution, and failure to do so would be a direct violation of the Code. Colorado is currently considering the following revisions:

Canon 6

A LAWYER SHOULD REPRESENT A CLIENT COMPETENTLY.

A new disciplinary rule, number 6-103, could be added as follows:

> "DR 6-103. Informed consideration of alternative forms of dispute resolution.
>
> (A) In order to provide competent representation, in a matter involving or expected to involve litigation, a lawyer shall advise the client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute, or to reach the legal objective sought.

Canon 7

A LAWYER SHOULD REPRESENT A CLIENT ZEALOUSLY WITHIN THE BOUNDS OF THE LAW.

A new disciplinary Rule 7-111 could be added as follows:

> "DR 7-111. Advice regarding alternative dispute resolution procedures.
>
> (A) Zealous representation requires the attorney to advise the client of alternative forms of dispute resolution.

Model Rule 2.1

Amended Rule 2.1 to read:

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation. IN A MATTER INVOLVING, OR EXPECTED TO INVOLVE LITIGATION, A LAWYER

SHALL ADVISE THE CLIENT OF ALTERNATIVE FORMS OF DISPUTE RESOLUTION WHICH MIGHT REASONABLY BE PURSUED TO ATTEMPT TO RESOLVE THE LEGAL DISPUTE, OR TO REACH THE LEGAL OBJECTIVE SOUGHT.

Even under the present Canon 5, "A lawyer should exercise independent professional judgment on behalf of a client" and Canon 6, "A lawyer should represent a client competently" many commentators indicate that advising clients of the potential benefits and risks of alternative methods of resolution is just as important as advising clients of the potential benefits and risks of litigation. Indeed, the provisions of Canon 7 that "A lawyer should represent a client zealously within the bounds of the law," does not require a slavish adherence to pursuit of litigation, but rather, a determination of how the client's interest can be best served within the available options which clearly involve alternative dispute resolution.

Failure to inform a client of a settlement offer or to seek a settlement when authorized to do so, constitutes professional negligence. Smiley v. Manchester Insurance and Indemnity Co., 375 N.E.2d 118 (Ill. 1978).

The California Court of Appeals found in a malpractice case that an attorney has a duty:

> "To advise and counsel a client as to all facts, circumstances, and consequences which are necessary to enable a client to make an informed decision on matters where they relate to the attorney's representation of a client."

Garris v. Severson, et al., 252 Cal. Rptr. 204, at 206 (1988). The case involved an engineer who had a million dollar judgment awarded against him and subsequently sued his attorneys claiming that he would have authorized settlement for a lower amount if he had been advised by his attorneys of certain information in depositions. The attorneys argued, among other things, that they were excused from advising the client because of his opposition to settlement during the initial stages of the case. The court ruled that such opposition did not excuse the attorneys from fulfilling their duty to inform the client fully and to fully discuss the consequences of the available methods of resolving the dispute.

> After all, the lawyer's superior skill and knowledge is what the client is paying for.... It is not uncommon for the client to have unwarranted faith in the righteousness of his position. The lawyer's job is to bring rationality, objectivity and experience to bear on the matter. (cites omitted) Id. at 207.

The Court of Appeals continued that the duty of care with respect to a client is:

> "A duty requiring attorneys to advise and counsel a client as to all facts, circumstances, and consequences which are necessary to enable a client to make an informed decision on matters such as... desirability of attempting settlement... Id. at 206.

A growing number of courts have imposed a duty on lawyers to use the alternative dispute resolution processes; it is quite common to require mediation through U.S. magistrates in the federal court and through court designated mediators in state courts.

II. The Binding Effect of Arbitration of Civil Rights Claims

In Alexander vs. Gardner-Denver Co., 415 U.S. 36, 194 S.Ct. 1011 (1974), the Supreme Court held that federal civil rights actions were not subject to compulsory arbitration. In 1991, the court took a major step away from the Gardner-Denver doctrine, and, although it did not overrule Gardner-Denver, it held in Gilmer v. Interstate/Johnson Lane Corp., 111 S.Ct. 1647 (1991), that an employee was required to submit an ADEA claim to arbitration pursuant to the provisions of the Federal Arbitration Act (FAA) as provided in the employee's registration as a securities representative on the New York Stock Exchange. This case clearly means that rights under employment discrimination statutes can be resolved through compulsory arbitration. A week after the Gilmer decision, the Supreme Court remanded a case from the Fifth Circuit involving claims of sexual harassment and sex discrimination in which the court had refused to compel arbitration of Title VII claims. Alferd v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991). The agreement to arbitrate was essentially identical to that in Gilmer. The Supreme Court directed the Fifth Circuit to reconsider its decision in the light of Gilmer.

In Gilmer, the majority noted that in passing OWBPA, "Congress, however, did not explicitly preclude arbitration or other nonjudicial resolution of claims even in its recent amendments to the ADEA." 111 S.Ct. at 653, note 3.

The FAA requires that there be an agreement to submit disputes to arbitration so that an employer cannot unilaterally require arbitration at any time. The agreement must be in writing, and, to be an enforceable contract, the arbitration agreement could be included in a written employment contract or in a separate contract. More importantly, in states where employee handbooks are recognized as enforceable contracts, the arbitration clause could be added to the handbook and should be as enforceable as other provisions of the handbook. For a fuller discussion of the implications of the Gilmer case, see Robert L. Duston, "*Gilmer v. Interstate/Johnson Lane Corp.*: A Major Step Forward for Alternative Dispute Resolution or A Meaningless Decision," The Labor Lawyer, Vol. 7, No. 4, Fall, 1991, p. 823.

III. Attorney's Fees

Any settlement agreement should specifically resolve the issue of attorneys' fees. Failure to do so could very easily be more costly than the settlement itself. The majority rule is that if plaintiff has obtained some relief on a substantial claim, he is eligible for an award of attorneys' fees even if no formal judgment is entered by the court or if it is not found that the defendants violated the law. If the defendant acquiesced on some or all of the plaintiff's demands, a settlement may be the basis for attorneys' fees. Maher v. Ghane, 448 U.S. 122, 100 S.Ct. 2570, 65

L.Ed.2d 653 (1980). The Civil Rights Attorneys' Fees Awards Act of 1976, codified at 42 U.S.C. § 1988, provides that,

> "In any action or proceeding to enforce a provisions of §§ 1981, 1982, 1983, 1985, and 1986 of this Title, Title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964, the court in its discretion, may allow the prevailing party, other than the United States, reasonable attorneys' fees as a part of the costs."

"A prevailing party must be one who has succeeded on any significant claim affording it some of the relief sought, either pendente lite or at the conclusion of the litigation." Texas State Teachers v. Garland Independent School District, 489 U.S. 749, 109 S.Ct. 1486, 103 L.Ed.2d 774 (1989). Hewitt v. Helms, 482 U.S. 755, 107 S.Ct. 2672, 96 L.Ed.2d 654 at 662 (1987), held that a plaintiff who obtained the relief sought because the defendant agreed to a settlement under pressure from the lawsuit may be considered the prevailing party.

There is no ethical problem in negotiating both the merits and the fee award, if any, simultaneously or separately. The Supreme Court has held that there is no conflict of interest in simultaneous negotiations of fees and merits and has argued that defendants will not be likely to settle unless their total liability is determined. See, Marek v. Chesny, 473 U.S. 1, 105 S.Ct. 3012, 87 L.Ed.2d (1985).

The Supreme Court has held that the Attorneys' Fee Award Act does not prevent a prevailing party from waiving its eligibility to recover attorneys' fees. In Evans v. Jeff D., 475 U.S. 717, 106

S.Ct. 1513, 89 L.Ed.2d 747, the Supreme Court held that a district court is not required to reject a settlement in a civil rights class action suit where the relief offered is equal to that which would probably be recovered at trial, but is conditioned on a waiver of attorneys' fees. The court held that a district court has the discretion to refuse to award attorneys' fees when the parties agreed on a settlement to waive those fees. Id. at 719.

IV. Expert Fees Can Be Part of Attorneys' Fees

The Supreme Court decision in West Virginia University Hospital v. Casey, ___ U.S. ____, 55 FEP Cases 353 (1991), holding that expert fees for non-testimonial services rendered by experts in civil rights litigation may not be shifted to a losing party was overturned by Section 113 of the Civil Rights Act of 1991 which authorized the award of such expert fees [subsection (c) of the Attorneys' Fees Awards Act (42 U.S. § 1988)]. The new Act provides that expert witness fees are included in the definition of recoverable attorneys' fees. The court had held that expert witness fees are separate from attorneys' fees and thus most costs of hiring expert witnesses could not be recovered by successful civil rights plaintiffs.

V. Offer of Judgment and Attorneys' Fees

A defendant should pay special attention to Rule 68 which provides for offers of judgment. The offer of judgment must be made at least 10 days before a trial and is irrevocable for ten days and must include "costs then accrued" by the party to whom the offer is made. It must be served on the adverse party in accordance with Rule 5(b) and only if accepted by the offeree must the offer be filed with the court. The advantage of Rule 68 is that if an offer is not accepted and the ultimate judgment is not more favorable than what was offered, the offeree is liable for the costs incurred by the offerer after the date of the offer.

In Delta Airlines v. August, 450 U.S. 346 (1981), the Supreme Court held that the Rule 68 offer is effective only in cases where the ultimate judgment is in the plaintiff's favor, but for an amount less than the defendant's settlement offer. In Delta Airlines, the plaintiff had sought $20,000 in damages in a Title VII civil rights suit, and the defendant made a Rule 68 offer of judgment of $450 which the plaintiff rejected. The district court ultimately entered judgment for the defendant. The district court and the court of appeals determined that the $450 offer was unrealistically low, but the Seventh Circuit Court of Appeals did note that the offer might be effective if plaintiff's claim had been wholly lacking in merit or if "additional factors" were present. The Supreme Court decided the case on the basis that since the judgment was not in plaintiff's favor, the Rule 68 offer was not effective.

It did not really address the issue of the "good faith" standard, and that is still an open question, though less so after Marek v. Chesny, 473 U.S. 1 (1985), which clearly stated that Rule 68 was designed to encourage settlements by making parties "think very hard" about settlement offers through the offer of judgment. Marek held that under Rule 68, if a settlement offer is rejected by the plaintiff in a civil rights action, the defendant is not liable for attorneys' fees incurred following the settlement offer provided the judgment recovered at a trial is less than the settlement offer. Rule 68 requires that the offer must allow judgment against the defendant for both the damages based on the merits of the claim and the costs accrued. Since the offer of judgment in Marek was for more than the jury verdict and the costs of attorneys' fees that were accrued up to the time of the offer of judgment, the plaintiffs were not liable for any costs including attorneys' fees incurred after the offer of judgment.

VI. Confidentiality of Settlement Agreements

While there is no specific federal rule on the matter, the reality is that most courts frown on the confidentiality of settlement agreements. In Bank of America National Trust and Savings Association v. Hotel Rittenhouse Associates, 800 F.2d 39 (3rd Cir. 1986), the court overturned the district court decision to uphold its original order sealing a confidential settlement agreement that had been filed with the court. The Third Circuit held that the common law right of access to judicial records applies to motions filed in court and to settlement agreements that are filed with the court. While that right of access must be balanced against factors militating against access, a general interest in encouraging settlements is insufficient; there must be a particular showing for the need of continuing secrecy. The court also noted that since the parties had used the judicial process to interpret and enforce the settlement agreement, the parties had waived the confidentiality that is normally accorded.

> Once a settlement is filed in the district court, it becomes a judicial record, and subject to the access accorded such records.

800 F.2d at 345. The court noted that if the parties had simply settled the case and then filed a voluntary stipulation of dismissal as provided in Rule 41(a)(1), Federal Rules of Civil Procedure, there would be no public access. If you wish to keep the settlement confidential, do not file it with the court; simply file a stipulation to dismiss.

Because of the Savings and Loan scandal and the action of the Resolution Trust Corporation in reaching settlements with many of the directors, law firms, and their insurance companies with attempted confidential provisions regarding the terms of the settlement, a number of bills have been introduced in the Congress to prohibit confidential settlement agreements in federal courts. See, H.R. 3803, The Federal Court Sunshine Act of 1991. If a settlement agreement is filed with the court, there is a risk of a motion to seal the agreement not being granted, so simply filing a stipulation to dismiss without the settlement agreement itself may be preferable and provide specific provisions in the settlement agreement requiring confidentiality of all parties.

However, the confidentiality provisions in any settlement agreement involving a school district are probably not enforceable because of most states' Open or Public Records Laws. See, Colorado Open Records Law, C.R.S. 24-72-201, et seq.

In Denver Publishing Co. v. University of Colorado, 812 P.2d 682 (Colo. App. 1990), cert. denied, the court held under the Colorado Open Records Law, § 24-72-203 and 204(6), C.R.S., that the newspaper was entitled to review a confidential settlement agreement. The newspaper sought the disclosure of an agreement which settled a dispute between the chancellor and the university. The chancellor was terminated and the matter was submitted to arbitration which resulted in an agreement setting forth the rights and duties of the university and the chancellor. The settlement agreement was placed in the chancellor's personnel file, and the university, based on the personnel files exception in the Open Records Act, refused to disclose the terms of the agreement. The provisions in the settlement agreement specified that all parties to the agreement, including the terminated chancellor, the university and the arbitration group agreed that the terms of the agreement would be confidential. The university argued that disclosure of the terms of the settlement of the controversy would "chill its future ability to resolve internal matters in dispute, thus effectuating a substantial injury to the public interest. While such an effect is possible, the public's right to know how public funds are expended is paramount considering the public policy of the Open Records Act." 812 P.2d at 685.

Anchorage School District v. Anchorage Daily News, 779 P.2d

1191 (Alaska 1989), concerned the Anchorage School District's suit against W.R. Grace Co. regarding removing and replacing fire proofing installed in the Anchorage High School; the case was removed to federal court and a settlement was reached. The Anchorage Daily News filed a motion in state court to obtain access to the settlement documents. The District Court ordered the district to disclose the terms of the Agreement, and, while an appeal was pending, the defendant, W.R. Grace Co., obtained an order from the U.S. District Court that the terms of the settlement not be disclosed. The Alaska Supreme Court, based on the Alaska Public Records Disclosure statutes held:

> The people of this state through their elected representatives, have stated in the clearest of terms that it is more important that they have access to this type of information than that it remain confidential. Thus, we hold that a public agency may not circumvent the statutory disclosure requirements by agreeing to keep the terms of a settlement agreement confidential. Under Alaska law, a confidentiality provision such as the one in the case at bar is unenforceable because it violates the Public Records Disclosure statutes.

779 P.2d at 1193.

Because the federal court order on confidentiality was still in effect, the superior court was directed not to require production of the settlement documents unless and until the federal protective order is vacated and modified. In a footnote, the Supreme Court noted that the U.S. District Court permitted the Daily News to intervene in the case and vacated the protective

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order and the settlement documents were released for public inspection.

State ex rel. Kinsley v. Berea Board of Education, 582 N.E.2d 653 (Ohio App. 1990), held that a settlement agreement entered into between a school board and teachers were not exempt from disclosure as trial preparation records under the Ohio Public Records Law, nor under the Ohio Open Meetings Law. Malek v. International Brotherhood of Electrical Workers, 749 F.2d 771 (D.C. Cir. 1984), is a case in which the union had settled with one of its members and the settlement agreement was deemed confidential, the court held that a union member had a statutory right under the Labor Management Reporting and Disclosure Act to inspect the records.

In the Bank of America National Trust case, supra, the Third Circuit did note a case in which the confidentiality of a settlement agreement was upheld when an action under the Freedom of Information Act (FOIA) was filed to seek the unsealing of the settlement agreement. In re: Franklin National Bank Securities Litigation, Federal Deposit Insurance Corp. v. Ernst & Ernst, 92 FRD 468 (E.D. N.Y. 1981), aff'd sub nom., F.D.I.C. v. Ernst & Ernst, 674 F.2d 230 (2nd Cir. 1982). That case involved the failure of the Franklin National Bank in which the FDIC sued Ernst & Ernst. The accounting firm insisted on the secrecy of the terms of the settlement, and, without such secrecy, the court determined that a settlement would not have been reached. The court noted that, "Secrecy of settlement terms under such conditions is a well-established American litigation practice." 92 FRD at 472. Since the litigants relied on the secrecy of the settlement terms to enter into the settlement agreement, since the key player in the settlement was a private party, there is a significant distinction and state open records laws do not apply.

The Second Circuit, in affirming the decision, noted that there was nothing in the legislative history of FOIA that suggested that the Congress intended FOIA to apply to courts or to confidentiality orders issued in an action in which the federal agency is a party. That same reasoning might be applied in an action under a state open records law if a court had sealed a settlement agreement. See also, Kramer v. Monogram Models, Inc., 700 F.Supp. 1348 (U.D. N.J. 1988), rev'd on other issues, sub nom. Palestri v. Monogram Models, Inc., 875 F.2d 66 (3rd cir. 1989), where the court held that where one party disclosed the claims against the other party rather than the terms of the settlement agreement, it was not considered a breach of a confidential settlement agreement since the terms remain confidential.

One should assume that a settlement agreement by a school district, or at least portions of it, may be subject to public review at some point regardless of the agreement of the parties to maintain the agreement confidential. For that reason, a suggested confidentiality clause is as follows:

> The terms of this Settlement Agreement, Release and Waiver shall be confidential and shall not be released to anyone other than the parties to this Agreement and their attorneys; provided, however, that the existence and terms of this Agreement may be disclosed (a) to those employees and representatives of a

> party to the extent that such disclosure is necessary to properly account for this Agreement and/or facilitate an audit by such party's accountants, or (b) to the extent required to comply with law or legal process. The parties shall give the other party reasonable notice prior to making a disclosure permitted under the foregoing clause (b).

VII. Calculation of Damages

One of the most significant aspects of preparing for settlement negotiations is a realistic calculation of potential damages. Damages for violations of constitutional rights are determined in accordance with principles derived from the common law of torts. Memphis Community School Dist. v. Stachura, 477 U.S. 299, 305, 106 S.Ct. 2537, 2543, 91 L.Ed.2d 249 (1986). Damages in tort cases are designed to provide "*compensation* for the injury caused to plaintiff by defendant's breach of duty." Carey v. Piphus, 435 U.S. 247, 255, 98 S.Ct. 1042, 1047, 55 L.Ed.2d 252 (1978). Compensatory damages may not be presumed, but must be proven. Carey, 435 U.S. at 263-64, 98 S.Ct. at 1052-53. Compensatory damages may include not only out-of-pocket loss and other monetary harms, but also such injuries as "impairment of reputation..., personal humiliation, and mental anguish and suffering." Gertz v. Robert Welch, Inc., 418 U.S. 323, 350, 94 S.Ct. 2997, 3012, 41 L.Ed.2d 789 (1974).

VIII. Waivers

Obviously, from a school district's point of view, any settlement of a civil rights claim should involve a settlement, release and waiver of the broadest kind, covering any and all possible claims which the plaintiff(s) has or might have against the School District. If the waiver involves any actual or potential claims under the Age Discrimination in Employment Act, then the provisions of the Older Workers Benefit Protection Act, which became law on October 16, 1990, have to be carefully followed. Section 201 dealing with waiver of rights or claims which is codified in 29 U.S.C. 626(f)(1) requires that the following be included:

> (1) The release must be written in language that can be understood by the average individual eligible to participate.
>
> (2) The waiver must specifically refer to rights or claims under ADEA.
>
> (3) It cannot waive claims that arise after the release is signed.
>
> (4) The plaintiff must receive something of value (consideration) in addition to anything that he or she is already entitled to.
>
> (5) Prior to executing the agreement, the individual must be advised in writing to consult with an attorney.
>
> (6) The individual must be given a period of at least twenty-one (21) days within which to consider the agreement; if the waiver is connected with exit incentives or other employment termination offered to a class or group of employees, the individual must be given forty-five (45) days.
>
> (7) The individual must be given at least seven (7) days to revoke the agreement, and it is not effective or enforceable until the revocation period has expired.
>
> (8) For a waiver in connection with an exit incentive or other employment termination

> program which is offered to a group or class of employees, the individual must be given written information on eligibility factors and other data concerning the age of those eligible and not eligible or selected for the program. (Forty-five (45) days' notice in understandable language must be given.)

If there is any question about the mental capacity of the plaintiff or individual giving the release, at a minimum, you should require some type of certification by the attorney representing the plaintiff that he or she asserts that the individual is capable of entering into the agreement and understands the agreement and waiver. A suggested clause is as follows:

> Employee represents that employee has reviewed and discussed this agreement and its subject matter with the attorney of employee's choice. Employee further represents that employee has voluntarily agreed to enter into this agreement, is legally competent and is under no physical or mental disability which precludes employee from understanding and executing this agreement. By signing this agreement, employee's attorney certifies the correctness of the statements in this paragraph.

IX. Admissibility of Settlement Discussions

While statements made in settlement negotiations or offered are not normally admissible in trial, be aware of some pitfalls and need for caution. It is important to note that Title VII of the Civil Rights Act of 1964 specifies that nothing said or done during conciliation may be sued as evidence, but the ADEA contains no similar provision. In EEOC v. Gear Petroleum, Inc., 57 FEP Cases, 457 (10th Cir. 1991), the court held that evidence obtained during conciliation need not be excluded in an action under the Age Discrimination and Employment Act so that each case involving such issues must be decided on its facts; the court did uphold the district court's exclusion of the evidence under Rules 403 and 408 of the Federal Rules of Evidence. As a general rule, all correspondence with settlement offers should specifically state that the contents may not be used for any purpose except settlement, and the same cautionary statement should be used before any settlement conference or mediation session.

X. Practical Considerations and Issues on Timing

Considerations that need to be borne in mind in analyzing settlement over litigation include:

- Cost analysis: The cost of going forward with litigation as opposed to the settlement costs. Factors often not borne in mind are the non-legal costs such as the time of administrators and other school employees in preparing for depositions and hearings and doing necessary research. Time away from their educational tasks may be quite significant.
- Is the claim covered by insurance? Obviously, this has a major impact on settlement options, and the insurance company will essentially control the decision.
- Non-economic factors. The type of case in question may have a huge bearing on settlement; the adverse publicity involved a prolonged civil rights trial may tip the

balance toward settlement. Even if there is an extremely strong legal defense, you need to note the types of adverse admissions that may have to be made in the course of discovery or the trial itself, even though the admissions will have no legal bearing on the outcome of the case.

- Impact on pending or future cases. Will the settlement set a precedent that is adverse to the interest of the district; will it encourage other claimants to file lawsuits against the district? Being able to maintain a settlement in a confidential setting can become quite important in this consideration. "If we settle this case, we will be flooded with lawsuits" is generally a misplaced prediction.
- Strength of witnesses. Good facts but poor witnesses (inarticulate, hesitant, unsympathetic) are clearly factors that must be balanced in reviewing settlement options. With the best legal arguments and factual scenario in the world, non-credible witnesses make for an uphill climb.

The bottom line usually has to be the balancing of the strength of plaintiff's case and the relative costs involved in litigation with the possibility of an adverse outcome compared to an immediate resolution and a precise tally of the economic costs to the district.

In approaching settlement, especially in the light of the Rule 68 standards, one must do a thorough and fair analysis of the liability in the case, the potential costs and attorneys' fees if one is unsuccessful, and above all, the nature of the emotional issue that a jury might have to deal with, such as issues involving sexual misconduct by a teacher.

The value of a third party intermediary in the negotiations settlement cannot be emphasized enough. A U.S. Magistrate or an experienced judge can fully explain the potential liabilities to both sides in a much more objective fashion than the attorneys for the litigants. Being highly prepared for such settlement conferences is crucial; you have to know exactly what the pluses and minuses of your case are and be able to communicate them clearly and succinctly to the mediator or magistrate, and you have to have clear parameters from your client or insurance company with regard to the levels of settlement that will be authorized in order to achieve an appropriate settlement. There is a momentum involved in settlement negotiations in having all your "ducks in a row." Having all appropriate information and all appropriate authority going into a settlement conference are the keys to success. Having to take long breaks, especially waiting for days to get authorization to make an offer may effectively undermine the momentum of the process.

Quick determination on the merits of the claim is obviously crucial. As a practical matter, one should consider taking the deposition of the plaintiff as quickly as possible, very often before any other discovery is undertaken. It has the advantage of preventing plaintiff's strategies being developed to "shore up" the weaknesses in their case. It puts you on early notice of any crucial weaknesses in your own case, especially information that may not have been communicated to you by your own client, and it nails down the factual basis for the plaintiff's claim at a very early stage. It lets you know whether you should concentrate on settlement or continued litigation.

TERMINATION OF EMPLOYEE
FIRST AMENDMENT VIOLATION AND RACE DISCRIMINATION

SAMPLE OF DEFENDANT'S REQUESTED JURY INSTRUCTIONS WITH SPECIAL INTERROGATORIES

- - -

IN THE UNITED STATES DISTRICT COURT
FOR THE ________________ DISTRICT
________________ DIVISION

____________________	§	
Plaintiff(s)	§	
v.	§	Civil Action No. ______
____________________	§	
Defendant(s)	§	Judge ______________

DEFENDANT'S REQUESTED JURY INSTRUCTIONS

[GENERAL INSTRUCTIONS]

DEFENDANT'S REQUESTED INSTRUCTION NO. 1

I will now summarize the contentions of the Plaintiff and the Defendant. You should understand that my summary is not evidence, and it is for you to determine whether the evidence fairly supports the parties' contentions. My summary of these contentions is not intended in any way to indicate to you how you should determine the facts.

The Plaintiff, ____________, claims damages alleged to have been sustained or suffered by her as a result of the deprivation, under color of state law, of a right secured to her by both the Constitution of the United States and by an act of Congress.

The Plaintiff alleges that she was not rehired as a classroom teacher by the Defendant. Plaintiff alleges that the Defendant's failure to rehire her was motivated by her exercise of activities protected by the First Amendment to the United States Constitution.

The Plaintiff also alleges that the Defendant's failure to rehire her was motivated by her race, white. The Plaintiff further alleges that the Defendant's failure to rehire her was motivated by retaliation against the Plaintiff for filing charges against the Defendant with the Equal Employment Opportunity Commission ("EEOC").

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 2

The Plaintiff brings this suit under Section 1983 of Title 42 of the United States Code, which provides that any inhabitant of this federal district may seek redress in this court, by way of damages, against any person or persons who, under color of any laws, statute, ordinance, regulation, or custom, knowingly subjects the inhabitant to deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

The statute just outlined to you comprises one of the Civil Rights Acts enacted by Congress under the Fourteenth Amendment to the Constitution of the United States. The Fourteenth Amendment to the Constitution provides that:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction equal protection of the laws.

DEFENDANT'S REQUESTED INSTRUCTION NO. 3

The Plaintiff also claims that the Defendant's adverse personnel actions were motivated by the Plaintiff's exercise of certain activities protected under the First Amendment to the United States Constitution. The First Amendment provides that:

> Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Defendant admits that it did not rehire the Plaintiff as a classroom teacher. The Defendant denies that its failure to rehire the Plaintiff as a classroom teacher was motivated in any way by the Plaintiff's exercise of protected First Amendment activities, her race, or her filing of EEOC charges. The Defendant further denies that the Plaintiff was damaged in any way or in any amount claimed by her.

To prove her case, the Plaintiff must prove by a preponderance of the evidence that her exercise of certain activities, which I shall address later, which are protected by the First Amendment, was a substantial or motivating factor in the personnel decisions of the school district. If the Plaintiff meets this initial burden, the Defendant is entitled to rebut this evidence and show that it would have taken these personnel actions even if the Plaintiff had not engaged in the First Amendment activities. This means that the First Amendment conduct by the Plaintiff could have been in the minds of those who did not rehire the

Plaintiff, and the First Amendment activity could have played a part in those decisions, so long as the same decisions would have been reached had the incident not occurred. The Plaintiff is not entitled, by engaging in conduct protected by the First Amendment, to require an employer to hire her.

The Plaintiff does not have a right to be hired by the Defendant. She must have applied for a job and be considered just as any other applicant. Once she resigned, the Plaintiff had no greater right to a job than any other applicant. If you find from a preponderance of the evidence that the Defendant would not have rehired the Plaintiff regardless of her involvement in any First Amendment activities, then you must return a verdict for the Defendant. Keep in mind that to return a verdict for the Plaintiff, you must find that the discrimination was pursuant to a custom or policy, and that the Board of Trustees knew or should have known of the custom or policy of discrimination.

DEFENDANT'S REQUESTED INSTRUCTION NO. 4

You are instructed that only the Plaintiff's speech on ____________ [date] is protected by the First Amendment. That is the only issue on Plaintiff's First Amendment claim that you are to address in determining whether the ______________ School District retaliated, or took adverse personnel action, against the Plaintiff.

DEFENDANT'S REQUESTED INSTRUCTION NO. 5

To prevail under her race discrimination claim, the Plaintiff must prove to you by a preponderance of the evidence that her race, white, was a substantial or motivating factor in the Defendant's decision not to rehire her; that is, that the discrimination was intentional or purposeful. The Defendant may then show a legitimate, non-discriminatory basis for its actions. If you find from a preponderance of the evidence that the Plaintiff would not have been rehired regardless of her race, then you must return a verdict for the Defendant. Keep in mind that to return a verdict for the Plaintiff, you must find that the discrimination was pursuant to a custom or policy, and that the Board of Trustees knew or should have known of the custom or policy of discriminating.

DEFENDANT'S REQUESTED INSTRUCTION NO. 6

To prevail on her retaliation claim, the Plaintiff must prove that her filing of EEOC charges was a substantial or motivating factor in Defendant's failure to rehire her. If you find that the Plaintiff would not have been rehired regardless of her filing of the EEOC complaints, then you must return a verdict for the Defendant. Keep in mind that to return a verdict for the Plaintiff, you must find that the discrimination was pursuant to a custom or policy, and that the Board of Trustees knew or should have known of the custom or policy of discriminating.

DEFENDANT'S REQUESTED INSTRUCTION NO. 7

In your consideration of the reasons given by the Defendant for the failure to rehire the Plaintiff, you do not have to find that the Defendant made a wise decision or that you would have made the same one. Under the law, an employer is entitled to make his or her own policy and business judgments. While an employer's judgment on an employment matter may seem erroneous to outsiders, the relevant question is whether the reasons given for the action are permissible under the Constitution and laws of the United States. Consequently, the focus of your deliberations is to be the motivation of the ________________ School District and not on its business judgment. You are not to second guess or question the business wisdom of what the school authorities did by substituting your judgment for theirs.

DEFENDANT'S REQUESTED INSTRUCTION NO. 8

You are instructed that for a school district to be held liable for the acts or omissions of any school official who proximately caused the injury to the Plaintiff, such acts or omissions must be pursuant to formally promulgated policies or well-established customs of the school district.

Policy is defined as a method or course of action officially adopted by a governmental body designed to influence and determine decisions. Custom is defined as a persistent and widespread practice which is so permanent and well-settled that it is tantamount to officially promulgated policy.

Reference 1: Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018 (1978).

Reference 2: Webster v. City of Houston, No. 81-2007, slip op. (5th Cir. August 9, 1984) (en banc).

DEFENDANT'S REQUESTED INSTRUCTION NO. 9

Instruction as to Knowledge of Governing Body

You are instructed that the ________________ School District cannot be held liable for damages under 42 U.S.C. § 1983 unless the Board of Trustees of the ______________ School District had knowledge of a custom or policy which it tolerated in violation of the Plaintiff's constitutional rights. The knowledge of the Board of Trustees can be either actual or constructive. Actual knowledge may be shown by such means as discussions at board meetings or receipt of written information. Constructive knowledge may be attributed to a governing body on the ground that it would have known of violations if it had properly exercised its responsibilities as, for example, where violations are so persistent and widespread that they were the subject of prolonged public discussion or of a high degree of publicity.

Bennet v. City of Slidell, 728 F.2d 762 (5th Cir. 1984).

DEFENDANT'S REQUESTED INSTRUCTION NO. 10

If you find that any of the Plaintiff's rights, either as I have defined, or will define them to you, were violated, you must next determine whether those violations were a proximate cause of any damages to the Plaintiff. You are instructed that you are not to award damages for any condition from which the Plaintiff may have suffered, or may now be suffering, unless it has been established by a preponderance of the evidence that such condition was proximately caused by a violation of the Plaintiff's rights. Damages are proximately caused by an act whenever it appears from a preponderance of the evidence that the damage was either a direct result or a reasonably probable consequence of the act.

You are not allowed to presume the Plaintiff has been damaged just because she shows a violation of her rights, if any. The Plaintiff must prove to you by a preponderance of the evidence that these violations, if any, have actually resulted in damage to her. Otherwise, you may award the Plaintiff only nominal damages of one dollar.

DEFENDANT'S REQUESTED INSTRUCTION NO. 11

Instruction as to Compensatory Damages

Compensatory damages are to make the Plaintiff whole for something she has lost. If you find, by a preponderance of the evidence and in accordance with all instructions given to you, in favor of the Plaintiff on the question of liability, you may give the Plaintiff nominal compensatory damages of only $1.00 unless the Plaintiff can prove she was actually damaged.[1] Even if you find that Plaintiff's constitutional rights have been violated, you may not automatically assume that she has been damaged by this violation.[2] She must prove this damage, if any, to you by a preponderance of the evidence.

Reference 1: Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042 (1978).

Reference 2: Memphis Community School District v. Stachura, 477 U.S. 299 (1986).

Your verdict will consist of your answers to the following questions:

WRITTEN INTERROGATORY NO. 1

Do you find from a preponderance of the evidence that Plaintiff speech on ________________ [date] was a substantial or motivating factor in the Defendant's decision not to rehire her as a classroom teacher?

Answer "We do" or "We do not."

ANSWER:____

WRITTEN INTERROGATORY NO. 2

If you answered Written Interrogatory No. 1, "We do," answer Written Interrogatory No. 2; otherwise do not answer this interrogatory.

Do you find from a preponderance of the evidence that the Defendant's decision not to rehire Plaintiff as a classroom teacher would have been made regardless of Plaintiff's speech on __________________ [date]?

Answer "We do" or "We do not."

ANSWER: ____

WRITTEN INTERROGATORY NO. 3

Do you find from a preponderance of the evidence that Plaintiff's race was a substantial or motivating factor in the Defendant's decision not to rehire her, that is, that the Defendant intentionally and purposefully discriminated against her?

Answer "We do" or "We do not."

ANSWER: ____

WRITTEN INTERROGATORY NO. 4

If you answered Interrogatory No. 3 "We do," answer Interrogatory No. 4; otherwise do not answer this Interrogatory.

Do you find from a preponderance of the evidence that Defendant would not have rehired Plaintiff regardless of her race?

Answer "We do" or "We do not."

ANSWER: ______________________________

WRITTEN INTERROGATORY NO. 5

If you answered Interrogatory No. 4 "We do not," answer Interrogatory No. 5; otherwise do not answer Interrogatory No. 5.

Do you find from a preponderance of the evidence that the Board of Trustees had a custom or policy or knew or should have known of a custom or policy of discriminating on the basis of race?

Answer "We do" or "We do not."

ANSWER: ______________________________

WRITTEN INTERROGATORY NO. 6

Do you find from a preponderance of the evidence that Plaintiff's filing of charges with the EEOC was a substantial or motivating factor in Defendant's decision not to rehire her?

Answer "We do" or "We do not."

ANSWER: ______________________________

WRITTEN INTERROGATORY NO. 7

If you answered Interrogatory No. 6 "We do," answer Written Interrogatory No. 7; otherwise do not answer this Interrogatory.

Do you find from a preponderance of the evidence that Plaintiff would not have been rehired regardless of her filing of the EEOC complaints?

Answer "We do" or "We do not."

ANSWER: ______________________________

WRITTEN INTERROGATORY NO. 8

If you answered Interrogatory No. 7 "We do not," answer Interrogatory No. 8; otherwise do not answer this Interrogatory.

Do you find from a preponderance of the evidence that Defendant's decision not to rehire Plaintiff was pursuant to a custom or policy of retaliating against employees for filing EEOC complaints and that the Board of Trustees knew or should have known of that custom or policy?

Answer "We do," or "We do not."

ANSWER: ______________________________

WRITTEN INTERROGATORY NO. 9

If you found that Defendant's decision not to rehire Plaintiff was substantially motivated by Plaintiff's speech on ______________ [date] and that Defendant would not have taken this action in absence of this speech, do you find that Defendant's action was the proximate cause of any damage to Plaintiff?

Answer "We do" or "We do not."

ANSWER: ______________________________

WRITTEN INTERROGATORY NO. 10

If you found that Defendant's decision not to rehire Plaintiff was substantially motivated by her race and that Defendant would not have taken this action in absence of this factor and that such action was taken pursuant to a custom or policy known or which should have been known to the Board of Trustees, do you find that Defendant's action was the proximate cause of any damage to Plaintiff?

Answer "We do" or "We do not."

ANSWER: ______________________________

WRITTEN INTERROGATORY NO. 11

If you found that Defendant's decision not to rehire Plaintiff was substantially motivated by her filing complaints with EEOC and that Defendant would not have taken this action in absence of Plaintiff's EEOC complaints and that the Defendant's action was pursuant to a custom or policy known or which should have been known to the Board of Trustees, do you find that Defendant's action was the proximate cause of any damage to Plaintiff?

Answer "We do" or "We do not."

ANSWER: ____

WRITTEN INTERROGATORY NO. 12

If you have answered Written Interrogatory Nos. 9, 10, or 11 "We do", answer Written Interrogatory No. 12; otherwise, do not answer this Interrogatory.

What sum of money, if any, will fairly and reasonably compensate the Plaintiff for damages sustained by her, if any, as a result of the adverse personnel decisions regarding the Plaintiff, if any?

Answer in dollars and cents, if any.

ANSWER: $__________________________.

You are instructed that the allegations of the Plaintiff as to the amount of damage she claims to have suffered are not to be considered, except that the damage claimed does fix a maximum limit, and the jury may not award the Plaintiff more than the amount claimed.

You are instructed that if the Plaintiff has not suffered any damage as a result of adverse personnel decisions, you may award her nominal damages of $1.00 and no more.[1]

Reference 1: Carey v. Piphus, 435 U.S. 247, 98 S. Ct. 1042 (1978); Wilson v. Taylor 658 F. 2d 1021 (5th Cir. 1981); Laje v. R.E. Thomason General Hospital, 665 F. 2d 724 (5th Cir. 1982).

> [This interrogatory concerning compensatory damages should be submitted to the jury as to defendants sued in their individual capacities only if the court determines that such defendants did not act in good faith. If should be submitted as to defendant school districts and its board of trustees sued for monetary relief.]

WRITTEN INTERROGATORY NO. 13

If you have answered Written Interrogatory No. 12 in an amount in dollars and cents,[1] answer Written Interrogatory No. 13; otherwise, do not answer Written Interrogatory No. 13.

What amount of money, if any, do you assess against the individual Defendants as punitive damages, if any? Consider each Defendant separately. You may consider an assessment of punitive damages only if you find that the particular Defendant injured the Plaintiff and that the individual Defendant's actions were the type of malevolent, outrageous or abusive conduct which indicates that the individual Defendant was motivated by ill will, spite, malice grudge against the Plaintiff individually.[2]

You are further instructed that punitive damages can be awarded against individuals only and not the ____________________ School District as an entity. Punitive damages can be awarded only to punish the individual and to deter that individual from future wrongful conduct. Punitive damages cannot be awarded to compensate the Plaintiff or make her whole for any damages she might have suffered as a result of the Defendants' actions.

Answer in dollars and cents, if any.

ANSWER: $______________________________ [Name of Individual Defendant]
$______________________________ [Name of Individual Defendant]

Reference 1: Daly v. Moore, 491 F.2d 104 (5th Cir. 1974); Boehne v. Southwestern Bell Telephone Co., 10 F. Supp. 788 (W.D. Tex. 1935).

Reference 2: Brown v. Bullard Independent School District, 640 F.2d 651 (5th Cir. 1981); Wooley v. Southwestern Portland Cement Co., supra; Bennett v. Howard, supra; Grey v. First National Bank of Dallas, note 12, supra; Sheppard Federal Credit Union v. Palmer, supra; Guillen v. Kuykendall, supra.

[This interrogatory should be submitted to the jury as to defendants sued in their individual capacities only if the court determines that such defendants did not act in good faith.]

CONDITIONS OF EMPLOYMENT
RACE DISCRIMINATION
CLASS ACTION

SAMPLE MOTION TO STRIKE CLASS ACTION ALLEGATIONS

- - -

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ______________
_______________ DIVISION

___________________	§	
	§	
Plaintiff(s)	§	
	§	
v.	§	Civil Action No. _____
	§	
___________________	§	
	§	
Defendant(s)	§	Judge _____________
	§	
	§	

DEFENDANT(S)'____________[Name] MOTION TO STRIKE CLASS ACTION ALLEGATIONS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Defendant, _______________ and moves this Court to strike the Plaintiff's class action allegations, and as grounds therefor would respectfully show unto the Court the following:

1. The Plaintiff, ___________ ,on __________ [date], filed this action on his own behalf and of other black persons similarly situated who have been employed and who are employed by _________ School District.

2. The Plaintiff alleged that Defendant ____________ had discriminated against the Plaintiff and other black persons in the alleged class with respect to compensation, terms, conditions, and privileges of employment by limiting, segregation, and classifying employees of ___________ in ways which deprived the Plaintiff and other black persons of

equal employment opportunity, and by discriminatory discharges and refusals to rehire the Plaintiff and other members of the class. Defendant filed its Answer on __________ [date], denying each and every material allegation contained in Plaintiff's Complaint, including the validity of the action's class allegation.

3. Plaintiff ____________ has failed to make a specific factual showing that the requirements of Rule 23 of the Federal Rules of Civil Procedure have been satisfied. Plaintiff's class action is based on broad conclusory statements which the Plaintiff at deposition was unable to support with specific facts.

4. The Plaintiff ___________ is not an adequate representative of the class the Plaintiff purports to represent.

5. There are no questions of law or fact presented in this case which are common to the Plaintiff, _____________, and the class he purports to represent.

6. The claims and allegations of the Plaintiff, ___________, are not typical of the class the Plaintiff purports to represent.

7. Counsel for the Defendant, __________, has conferred with the Plaintiff's counsel __________, who stated that she was unable to agree to the relief sought through this motion.

WHEREFORE, PREMISES CONSIDERED, Defendant, ___________ ,prays that relief be granted in accordance with this Motion; that the Defendant's Motion to Strike Class Action Allegations be granted, and for such other and further relief to which this Defendant may show itself justly entitled.

Respectfully submitted,

____
[Name of Law Firm]
____

____
[Address of Law Firm]

____
[Telephone Number]

BY: ______________________________
[Signature of Counsel for Plaintiff(s)]

____
State Bar No.

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of __________, 19__, a true and correct copy of the above and foregoing pleading was served upon counsel of record by placing same in the United States mail, certified, return receipt requested, postage prepaid and addressed as follows:

____
[Name of Counsel for Plaintiff(s)]

____
[Name of Law Firm]

____
[Address of Law Firm]

____
[Signature of Counsel for Defendant(s)]
ATTORNEY FOR DEFENDANT(S)

CONDITIONS OF EMPLOYMENT
RACE DISCRIMINATION
CLASS ACTION

SAMPLE MEMORANDUM IN SUPPORT OF MOTION TO STRIKE CLASS ACTION ALLEGATIONS

- - -

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ______________
______________ DIVISION

	§	
________________	§	
	§	
Plaintiff(s)	§	
	§	
v.	§	Civil Action No. _____
	§	
________________	§	
	§	
Defendant(s)	§	Judge ____________
	§	
	§	

MEMORANDUM IN SUPPORT OF DEFENDANT(S)' ___________[Name] MOTION TO STRIKE CLASS ACTION ALLEGATIONS

I. BACKGROUND

Plaintiff, ____________ was employed by the Defendant, ____________ as a laborer on ____________ [date]. In the course of his employment with Defendant ____________ he was promoted to bricklayer helper on ____________ [date], promoted to bricklayer journeyman on ____________ [date]. In ___[date], the Plaintiff __________ was absent from work for a total of 52 days. After being counseled on __________ [date] with regard to his absenteeism, Plaintiff ____________ was absent 15 more days in the remaining two and a half months of the year. Based on his excessive absenteeism, the decision was made to terminate the Plaintiff, ___________. The Plaintiff's termination was effective on ____________ [date].

On ____________ [date], the Plaintiff field this action on his own behalf and on behalf of other black persons similarly situated who have been employed and who are employed by Defendant ____________. The Plaintiff alleged that _____ had discriminated against the Plaintiff and other black persons in the alleged class with respect to compensation, terms, conditions, and privileges of employment by limiting, segregating, and classifying employees of __________ in ways which deprived the Plaintiff and other black persons of equal employment opportunities, and by discriminatory discharges and refusals to rehire the Plaintiff and other members of the class. Defendant, _____________ filed its Answer on _____________ [date], denying each and every material allegation contained in Plaintiff's Complaint, including the validity of the action's class allegations.

II. PLAINTIFF HAS FAILED TO MAKE A SPECIFIC FACTUAL SHOWING THAT THE REQUIREMENTS OF RULE 23 HAVE BEEN SATISFIED.

Rule 23(a) of the Federal Rules of Civil Procedure sets forth the specific criteria which must be satisfied by the named Plaintiff before a class may be certified:

> "(a) Prerequisites to a class action. One or more members may sue or be sued as a representative party on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class and (4) a representative party will fairly and adequately protect the interest of the class."

The criteria of Rule 23(a) are cumulative. The named Plaintiff must satisfy the prerequisites of numerosity, commonality, typicality, and adequate representation or be content to limit his or her claim to an individual action.

In East Texas Motor Freight Systems, Inc. v. Rodriguez, 431 U.S. 395, 14 FEP Cases 1505 (1977), the Supreme Court established that plaintiffs basing their claims on Title VII of the Civil Rights Act of 1964 must prove that the requirements of Rule 23 are met before a class can be certified; and generalized allegations, as a matter of law, are insufficient. Claims of class representation must be scrutinized carefully by the trial court to ensure that the requirements of Rule 23 are met. In Rodriguez the Supreme Court summarized its rule in class action cases as follows:

> We are not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs. Common questions of law or fact are typically present. But careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable. The mere fact that a complaint alleges racial or ethnic discriminations does not in itself insure that the party who has brought the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination.

14 FEP at 1509 (emphasis added).

If the language of the Supreme Court is to be given any meaning at all, general conclusory statements such as those found in the Plaintiff's Complaint and in his deposition testimony, fail to meet the prerequisites for class certification. The burden is on the Plaintiff to affirmatively show that all the prerequisites of Rule 23(a) are met in order to establish that a case may be maintained as a class action. Darden v. G.T.E. Sylvania, Inc., 10 FEP Cases 1097 (N.D. Ga. 1973), aff'd 514 F.2d 1070 (5th Cir. 1975).

The Plaintiff must prove, with specific facts, that all the requirements of Rule 23(a) are met. Failure to carry this factual burden mandates dismissal of the class allegations, even in employment discrimination suits. Rodriguez, supra. In his Complaint and through his deposition testimony, the Plaintiff has failed to set forth facts or describe specific District-wide policies which make the particularized factual showing required to satisfy Rule 23(a).

III. PLAINTIFF'S CLAIMS ARE NOTHING MORE THAN PERSONAL GRIEVANCES AND FAIL TO MEET THE RULE 23(a) REQUIREMENT OF COMMONALITY AND TYPICALITY.

Rule 23(a) requires that the named Plaintiff have claims "typical" of those of the alleged class and that there be "common questions of law or fact." If a plaintiff's claims are in the nature of personalized grievances, the commonality and typicality requirements of Rule 23 are not satisfied. Grievances of a unique nature, generated by individual treatment, rather than policies uniformly affecting a recognizable group, do not satisfy the prerequisites of Rule 23(a). Bailey v. Ryan Stevedoring Company, 528 F.2d 551 (5th Cir. 1976); Wells v. Ramsey, Scarlett & Company, 506 F.2d 436 (5th Cir. 1975); Wright v. Stone Container Corp., 524 F.2d 1058 (8th Cir. 1975); Thompson v. Sun Oil Company, 523 F.2d 647 (8th Cir. 1975); Gresham v. Ford Motor Company, 53 FRD 105 (N.D. Ga. 1970). The court in Wells v. Ramsey, Scarlett & Company, supra, phrased it simply in stating that when there was no "nexus" between the named plaintiff and the alleged class other than a common fact of race, the plaintiff's claims were not appropriate for class treatment.

Throughout Plaintiff's deposition, the emphasis of his testimony and the support for his allegations were his individual claims. After extensive interrogation, Plaintiff was able to identify only four black employees of Defendant ___________ other than himself, whom the Plaintiff felt had been discriminated against. (Plaintiff's Deposition pp. ___, ___, ___, ___, ___.) Plaintiff's claims of discrimination regarding these four individuals were indecisive, vague and often ambiguous. Furthermore, from the dates cited by the Plaintiff with regard to his co-workers it appears that many of these allegations involved incidents which occurred more than 180 days prior to the time the Plaintiff filed a charge with the Equal Employment Opportunity Commission; therefore, such claims would be inappropriate for treatment in this class. Evans v. United Airlines, Inc., 431 U.S. 553 (1977).

The Plaintiff is required to prove the existence of policies affecting both the Plaintiff and an identifiable group. Vaguely alleging the existence of "discrimination" is insufficient. Rodriguez, supra. The broad conclusory allegations made in the Plaintiff's Complaint are supported only by specific facts which relate to the Plaintiff's individual claim. Plaintiff's allegations of discrimination are not concerned with uniform policies of widespread application, but rather are claims alleging acts of individual discrimination against him as an individual. In both his Complaint and deposition, the Plaintiff has failed to show that any policies exist at ____________ which discriminate against the Plaintiff and an identifiable group, or that an identifiable group has been injured. The Plaintiff's claims are not "typical" of an alleged class and there exists no "question of law and fact common" to the Plaintiff and any alleged class.

Further elucidation of the commonality and typicality requirements is provided by the Fifth Circuit in Herbert v. Monsanto Company, 576 F.2d 77 (5th Cir. 1978) vacated on other grounds, 580 F.2d 178 (5th Cir. 1978), and by Judge Singleton in his interpretation and application of that case in Wilson v. Anderson Greenwood & Co., C.A. No. 76-H-2086 (S.D. Tex. 1979) (a copy of the unpublished opinion is attached as Exhibit A). the plaintiff in Monsanto sought to represent persons from different departments within the company although the plaintiff worked solely in the trucking department of the defendant company. The court in discussing whether the plaintiff's claim, which arose out of activities in the trucking department, was typical of the claims of employees in other departments, stated:

> "This so called typicality requirement insures that the class action will not be a mere procedural umbrella for individual claims. Of course, although there need not be identity of claims, there must be common elements of law or fact such that the class action would be an economical way of prosecuting and defending claims. . . It would be a better test for typicality to consider whether the types of facts or evidence were typical of the class. Herbert, 576 F.2d at 80 (emphasis added).

In Wilson supra, Judge Singleton noted that the Fifth Circuit in Herbert, supra had stressed the necessity of looking at the evidence needed to prove the plaintiff's case vis-a-vis that needed to prove the class claim. Because the named plaintiff in Herbert had been terminated for excessive absenteeism, the Court noted that it was probable that an inordinate amount of time would be spent on the plaintiff's number of absences from work, and that such evidence had no relevance to the claim of discrimination by the class members. As a result, the court determined that the plaintiff's claim was not typical within the meaning of Rule 23 and that certification of such a case would be an uneconomical use of the class action device. The facts in Wilson closely track those in the case sub judice. Litigation in the instant case of the named Plaintiff's allegations of discriminatory promotion, discharge, and rehire practices will involve extensive review of the Plaintiff's absenteeism, tardiness, and work performance record. Such a review has little relevance to Plaintiff's broad class claims of discrimination; therefore, as in Wilson, supra, this matter is inappropriate for class treatment.

IV. PLAINTIFF HAS FAILED TO MEET THE RULE 23(A) REQUIREMENT OF ADEQUATE REPRESENTATION.

Rule 23(a)(4) provides that: "A representative party will fairly and adequately protect the interest of the class." The personal and individual nature of the Plaintiff's claim and his lack of interest in representing a class is indisputedly established in the course of his deposition when the Plaintiff twice denied that he was pursuing this action for any person other than himself. (Plaintiff's Deposition p. ___). Furthermore, Plaintiff's inability to adequately represent the purported class is illustrated by his failure to file a motion for class certification. The case sub judice was first filed by the Plaintiff on __________[date]. Throughout the course of almost three years of litigation, the Plaintiff has failed to file a motion for class certification. In Rodriguez the Supreme Court specifically noted that failure to file a motion for class certification was strong indication of inadequate representation:

> ...[T]he record before the Court of Appeals disclosed at least two other strong indications that they [the named plaintiffs] would not 'fairly and adequately protect the interest of the class.' One was their failure to move for class certification prior to trial. 14 FEP at 1509.

Although this case has been filed for almost three years and is currently on this Court's __________[date] docket, the Plaintiff has filed only one set of interrogatories. It is significant that of the 25 interrogatories, only four appear to relate to a class claim. With regard to the four class-related interrogatories, Defendant has objected to the breadth of the questions on the basis of relevancy; and, to the limited extent that the Defendant believes the interrogatories are relevant, has offered to make certain documents available to Plaintiff for inspection pursuant to Rule 33(c). To Defendant's knowledge, Plaintiff has not made any effort to compel Defendant to respond to the interrogatories to which Defendant objected, nor has Plaintiff taken advantage of any Rule 33(c) discovery.

Finally, Plaintiff's ability to adequately represent the class he seeks to represent is seriously jeopardized by his absence from __________ employment ranks for seven years. The Plaintiff's deposition reflects a lack of awareness of the current policies, practices and procedures at _______, and a lack of familiarity with people currently employed at the District. The only individuals currently employed by __________ that the Plaintiff was able to identify are three brothers-in-law and one cousin. (Plaintiff's Deposition pp. ___-___).

The Plaintiff's denial that he wishes to represent anyone other than himself in this action, his failure to seek certification of this matter as a class action, his failure to aggressively pursue discovery with regard to the class, his limited and almost nonexistent contact with personnel, and his long absence from employment with the District can lead only to the conclusion that the Plaintiff would be an inadequate representative of the class which he purportedly seeks to represent.

V. CONCLUSION

The Supreme Court has held in Rodriguez that any plaintiff in a Title VII action must prove with specific facts that the prerequisites of Rule 23 are satisfied. Through the broad allegations of his Complaint and the vague discrimination claims of his deposition the Plaintiff, has failed to meet this burden. The Plaintiff has not shown that his charges of discrimination are "typical of the alleged class" or that there exists "common questions of law or fact". Moreover, the Plaintiff has failed to adequately represent the class that has allegedly suffered discrimination, or demonstrate that a class has in fact been injured. Plaintiff's claims are nothing more than personal grievances and, as such, should be adjudicated as an individual action. Therefore, Defendant's Motion to Strike Class Action Allegations should be granted by this Court.

Respectfully submitted,

____
[Name of Law Firm]
____

____
[Address of Law Firm]

____
[Telephone Number]

BY: ______________________________
[Signature of Counsel for Plaintiff(s)]

____
State Bar No.

ATTORNEY FOR DEFENDANT(S)

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of __________, 19__, a true and correct copy of the above and foregoing pleading was served upon counsel of record by placing same in the United States mail, certified, return receipt requested, postage prepaid and addressed as follows:

____
[Name of Counsel for Plaintiff(s)]

____
[Name of Law Firm]

____
[Address of Law Firm]

____
[Signature of Counsel for Defendant(s)]

RACE DISCRIMINATION
VIOLATION OF TITLE VII

SAMPLE MOTION TO STRIKE DEMAND FOR JURY TRIAL

- - -

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ______________
______________ DIVISION

____________________	§	
	§	
Plaintiff(s)	§	
	§	
v.	§	Civil Action No. _____
	§	
____________________	§	
	§	
Defendant(s)	§	Judge ____________
	§	
	§	

DEFENDANT(S)'____________[Name] MOTION TO STRIKE DEMAND FOR JURY TRIAL

Comes now Defendant, ____________ School District ("School District"), by its attorneys, and submits its Motion to Strike, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure. In support thereof, the School District states as follows:

1. Plaintiff's Amended Complaint is in four (4) counts. Plaintiff's Amended Complaint bears a general demand for a jury trial as to all counts.

2. Count II of the Amended Complaint purports to state a cause of action for disparate impact race discrimination arising under the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq ("Title VII").

3. There is no right to a jury trial under Title VII for disparate impact discrimination.

WHEREFORE, for all the foregoing reasons, the instant Motion is well taken an

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should be granted in its entirety with an award of costs and attorneys' fees to Defendant.

Respectfully submitted,

____
[Name of Law Firm]
____

____
[Address of Law Firm]

____
[Telephone Number]

BY: ______________________________
[Signature of Counsel for Plaintiff(s)]

____
State Bar No.

ATTORNEY FOR DEFENDANT(S)

RACE DISCRIMINATION
VIOLATION OF TITLE VII

SAMPLE MEMORANDUM IN SUPPORT OF MOTION TO STRIKE DEMAND FOR JURY TRIAL

- - -

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ________________
________________ DIVISION

	§	
____________________	§	
	§	
Plaintiff(s)	§	
	§	
v.	§	Civil Action No. _____
	§	
____________________	§	
	§	
Defendant(s)	§	Judge ______________
	§	
	§	

MEMORANDUM IN SUPPORT OF DEFENDANT(S)'____________[Name] MOTION TO STRIKE DEMAND FOR JURY TRIAL

Comes now Defendant, ______________ School District ("School District"), by its attorneys, and submits this Memorandum in Support of its Motion to Strike in the above-captioned matter.

I. STATEMENT OF THE CASE

Defendant's Statement of the Case was adequately set forth in it's Memorandum in Support of its Motion to Dismiss, which was filed this date. The information contained therein shall not be reiterated, but shall be incorporated by reference herein.

II. ARGUMENT

A. Plaintiff's Demand for a Jury Trial as to Count II Should be Stricken as Title VII does not Provide for the Right to a Jury Trial For Disparate Impact Claims

Plaintiff's Amended Complaint is in four counts. The Amended Complaint bears a general demand for a jury trial as to all counts. Count II of the Amended Complaint purports to state a cause of action arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq., ("Title VII") for disparate impact race discrimination. Plaintiff's demand for a jury trial as to Count II is without merit and should be stricken.

Under the Civil Rights Act of 1991, Congress made jury trials available under Title VII of the 1964 Act for intentional discrimination claims; it did not do so for cases alleging discrimination through disparate impact. Prior to the 1991 Act, it was well settled in this circuit that trial by jury is not available in any Title VII action. See, Harmon v. May Broadcasting Co., 583 F.2d 410 (8th Cir. 1978). Other circuit courts that considered the matter had concluded likewise. See, e.g., Robinson v. Lorillard Corp., 444 F.2d 791, 802 (4th Cir. 1971); Slack v. Havens, 522 F.2d 1091, 1094 (9th Cir. 1975); Grayson v. Wickes Corp., 607 F.2d 1194, 1096 (7th Cir. 1979), and many others too numerous to cite. These rulings have not been reversed to the extent that they ruled that jury trials are unavailable in disparate impact cases. Therefore, Plaintiff's demand for a jury trial as to her Title VII claim for disparate impact discrimination should be stricken.

III. CONCLUSION

WHEREFORE, for all the foregoing reasons, Defendant's Motion to Strike is well taken and should be granted in its entirety, with an award of costs and attorneys fees to Defendant.

Respectfully submitted,

____
[Name of Law Firm]
____

____

[Address of Law Firm]

____
[Telephone Number]

BY: ______________________________
[Signature of Counsel for Plaintiff(s)]

____
State Bar No.

ATTORNEY FOR DEFENDANT(S)

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of __________, 19__, a true and correct copy of the above and foregoing pleading was served upon counsel of record by placing same in the United States mail, certified, return receipt requested, postage prepaid and addressed as follows:

____
[Name of Counsel for Plaintiff(s)]

____
[Name of Law Firm]

____
[Address of Law Firm]

____
[Signature of Counsel for Defendant(s)]

____
[Name of Law Firm]

____
[Address of Law Firm]

[Signature of Counsel for Defendant(s)]

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DEMOTION
LACK OF DUE PROCESS AND FIRST AMENDMENT VIOLATION
SAMPLE NOTICE OF REMOVAL

IN THE UNITED STATES DISTRICT COURT
FOR THE ________ DISTRICT OF _________
________ DIVISION

	§	
______________	§	
	§	
Plaintiff(s)	§	
	§	
v.	§	Civil Action No. _____
	§	
______________	§	
	§	
Defendant(s)	§	Judge _________
	§	
	§	

NOTICE OF REMOVAL

___________________ Independent School District and Individual Defendants in the above-styled cause, petition this court, pursuant to 28 U.S.C. § 1446, for removal of this action from the [state court] to the United States District Court for the ______________ District of _________, _________ Division, and in support of their Notice respectfully state as follows:

1. A civil action was filed by Plaintiff on or about [date] in [state court], against Defendants entitled, [Name of Case], Cause No. ________. A true and correct copy of Plaintiff's Original Petition in said action is attached hereto as Exhibit "1". The action seeks damages for Defendants' alleged violations of Plaintiff's civil rights under the United States Constitution and statutes, and for Defendants' alleged violations of Plaintiff's state constitutional and statutory rights.

2. In this civil action, Plaintiff sets forth claims of a civil nature of which this court has original jurisdiction, and which arise under the Constitution, treaties, or laws of the United States, in that as appears from Plaintiff's complaint, a copy of which is attached hereto, Plaintiff makes the following claims under federal law:

a. Plaintiff claims Defendants demoted Plaintiff, "willfully, wantonly, and intentionally" without due process "under U.S. Const. amend. XIV § 1."

b. Plaintiff "asserts that her constitutional rights of free speech under the First Amendment of the Constitution for the United States and State Constitution were violated and denigrated by Defendants' conduct."

Said claims are removable to federal court under 28 U.S.C. § 1441(b) which provides that "[a]ny civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to citizenship or residence for the parties." This Court has original jurisdiction of this action pursuant to 28 U.S.C. § 1331, which grants district courts original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

3. When a federal question initially exists so as to allow removal, the court may, in its discretion, hear the state claim under the doctrine of pendent jurisdiction. In re Carter, 618 F.2d 1093 (5th Cir.), cert. denied, 450 U.S. 949 (1980); Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1376 (5th Cir. 1980).

4. This court, therefore, has original jurisdiction of this action pursuant to 28 U.S.C. § 1331, and that jurisdiction is exercisable by removal under 28 U.S.C. § 1331 and § 1441(b) in that it involves a civil action arising under the Constitution, laws, or treaties of the United States.

5. Defendants file this Notice in this court within thirty days after any Defendant's receipt of Plaintiff's initial pleading "through service or otherwise."

6. No Defendant has filed an Answer or other pleading with the [state court]. Defendants, with the exception of Defendant ___________, were formally served by personal service on or about [date]. Copies of the citations and sheriff's returns for all Defendants are attached hereto and incorporated herein as Exhibits "2-7". Defendant _______________ has not yet been served, but joins in this Notice of Removal.

7. Upon filing of this Notice of Removal of this case, written notice of the filing is being given by Defendants to the Plaintiff as required by law. A copy for such notice with Certificate of Service is attached hereto. A copy of this Notice of Removal is also being filed with the Clerk of the State Court in which this cause was originally filed. The requirements of 28 U.S.C. § 1446(a) (b), and (d) are, accordingly, satisfied.

8. The time within which Defendants are required by the laws of the State of ___________ and state rules of civil procedure to plead or answer the declarations in the above-styled and numbered cause has not yet expired, and the time within which the above named Defendants are required by the laws of the United States [28 U.S.C. § 1446(b)] to file this Notice of Removal has not yet expired.

WHEREFORE, Defendants respectfully pray that this cause be removed from State Court, in accordance with 28 U.S.C. §§ 1441 and 1446, to the United States District Court for the District of _________, ________ Division.

Respectfully submitted,

By: ______________________________
ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on the ____________ day of _______________, 19 _____, a true and correct copy of the above and foregoing pleading was served upon counsel of record by placing same in the United States mail, certified, return receipt requested, postage prepaid and addressed as follows:

[Name and Address of Plaintiff's Counsel]

____
[Signature]

EMPLOYMENT CLAIM

SETTLEMENT AGREEMENT, INDEMNIFICATION AND RELEASE FROM LIABILITY

STATE OF ____________ §
§
COUNTY OF ____________ §

This Settlement Agreement, Indemnification and Release from Liability (Agreement) is executed between the ______________ School District, its trustees, officials, agents and employees, and Complainant ____________, and includes the following terms:

I.
Introduction

WHEREAS, Complainant initiated a lawsuit in federal district court styled, [Name of Case], Civil Action No. ________, in the United States District Court for the _________ District of _________, _________ Division; and

WHEREAS, the School District, its trustees, officials, agents and employees and Complainant have agreed to compromise and settle all matters between them;

NOW, THEREFORE, the parties voluntarily execute this Agreement with the express intention of extinguishing all obligations, claims and causes of action designated in the Agreement.

II.
Consideration

In exchange for the consideration tendered by Complainant as outlined below, the School District agrees to pay the sum of $________, which constitutes full and final compensation for all alleged damages incurred by Complainant based on the facts giving rise to this lawsuit. A check in this amount will be made payable to Complainant and the law firm of ____________. This check will be delivered to the law firm of ____________ upon the signing of this Agreement by all parties.

In exchange for this consideration, Complainant agrees to:

(a) dismiss with prejudice the lawsuit in federal district court styled [Name of Case], Civil Action No. _______, in the United States District Court for the _________ District of _________, _________ Division. A motion and order dismissing the lawsuit with prejudice will be filed by Complainant's Attorney on Complainant's behalf after execution of this Agreement and delivery to Complainant's Attorney of the above referenced $_________ check. Complainant will make reasonable efforts to secure dismissal of this case as soon as possible after the execution of this Agreement. If she does not seek the dismissal of this legal proceeding for any reason, this Agreement becomes void. If the court fails to sign the dismissal order for any reason, Complainant agrees to voluntarily non-suit the case;

(b) release, acquit, and discharge the School District, its trustees, officials, agents and employees from all obligations, demands, claims, causes of action and liability of whatsoever nature, including legal fees and court costs, which were raised or could have been raised against them arising out of Complainant's employment at the School District; and

(c) indemnify and hold harmless the School District, its trustees, officials, agents and employees from all claims, counterclaims, actions for contribution and/or indemnity, or any other legal actions which may be asserted in the future relating to Complainant's claims against the School District.

III.
No Admission of Liability

It is expressly agreed that the terms of this Agreement are contractual and not merely recitals. The consideration given by all parties is to compromise doubtful and disputed claims arising out of Complainant's employment at the School District, to avoid litigation, and to buy peace. No consideration given by any party shall be construed as an admission of liability, any such liability being specifically denied by signing this Agreement.

IV.
Attorneys' Fees and Court Costs

It is expressly agreed by Complainant that the monetary consideration given in this case constitutes full and complete remuneration for all alleged damages, costs and expenses incurred by Complainant, including legal fees and court costs. As further consideration for this Agreement, Complainant expressly releases, acquits and discharges the School District, its trustees, officials, agents and employees, from any further claim or obligation for legal fees or court costs arising from this lawsuit.

V.
No Assignment

As further consideration, the parties executing this Agreement do hereby for themselves and their legal representatives, expressly warrant and represent to all parties that they are legally empowered and competent to execute this Agreement. Furthermore, they have not nor will in the future assign, pledge, transfer or otherwise convey any right, title, interest or claim in the Agreement to any third party.

VI.
Governing Law

In any legal proceeding relating to this Agreement, the Agreement shall be governed and interpreted by [State] law and venue for such proceeding shall be in [jurisdiction].

VII.
Entire Agreement

This Agreement is the entire agreement between the parties. Any amendment shall be in writing.

VIII.
Miscellaneous

The School District, its trustees, officials, agents, and employees and Complainant expressly warrant and represent to each other that, before executing this Agreement, they have fully informed themselves of its terms and conditions, contents and effects. Furthermore, they understand that this is a full, final and complete settlement of all claims between the parties. They further understand this Agreement has been approved by Complainant and the School District Board of Trustees. In addition, this Agreement is executed without coercion or reliance upon any statement, promise or representation not recited in the Agreement.

WITNESS OUR HANDS as indicated below.

____________ SCHOOL DISTRICT

By: ______________________
____

Date: ______________________

ATTEST:

By: ______________________
____
Secretary, Board of Trustees
Date: ______________________

By: ______________________
Complainant

Date: ______________________